No. 93-880-CSX
Status: GRANTED

Title: Judy Madsen, et al., Petitioners
v.
Women's Health Center, Inc., et al.

Docketed:
December 3, 1993

Court: Supreme Court of Florida

Counsel for petitioner: Staver,Matthew D., Gaffney Jr.,Edward McGlynn

Counsel for respondent: D'Alemberte,Talbot, Tanner,John

Entry	Date	Note	Proceedings and Orders
1	Dec 3 1993	G	Petition for writ of certiorari filed.
2	Dec 29 1993	N	Motion\of petitioners Judy Madsen, et al. to strike petition for writ of certiorari in 93-833 filed.
3	Jan 5 1994		DISTRIBUTED. January 21, 1994 (Page 14)
4	Jan 7 1994		Opposition of respondents Operation Rescue, et al. to motion of petitioners Judy Madsen, et al. filed.
5	Jan 10 1994	X	Brief of respondents Women's Health Center, Inc., et al. in opposition filed.
6	Jan 18 1994		REDISTRIBUTED. January 21, 1994 (Page 15)
7	Jan 21 1994		Petition GRANTED. The brief of petitioner is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, March 4, 1994. The brief of respondents is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, April 1, 1994. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, April 15, 1994. Rule 29 does not apply. **********
8	Feb 14 1994		Record filed.
		*	Original record proceedings Supreme Court of Florida (BOX).
9	Mar 2 1994		Brief amici curiae of Defendants Operation Rescue, et al. filed.
10	Mar 3 1994		Brief amicus curiae of Rutherford Institute filed.
11	Mar 3 1994		Brief amicus curiae of National Right to Life Committee, Inc. filed.
12	Mar 3 1994		Brief amicus curiae of American Family Association filed.
14	Mar 3 1994		Joint appendix filed.
15	Mar 3 1994		* Joint Appendix in two volumes.
16	Mar 3 1994		Brief of petitioners Judy Madsen, et al. filed.
21	Mar 3 1994		Brief amicus curiae of Rutherford Institute filed.
17	Mar 4 1994		Brief amici curiae of petitioners Christian Legal Society, et al. filed.
18	Mar 4 1994	G	Motion of American Federation of Labor and Congress of Industrial Organizations for leave to file a brief as amicus curiae filed.
19	Mar 4 1994		CIRCULATED.
22	Mar 4 1994		Brief amici curiae of Southern Center for Law & Ethics, et al.(TO BE REPRINTED) filed.
20	Mar 7 1994		SET FOR ARGUMENT WEDNESDAY, APRIL 27, 1994. (1ST CASE).
24	Mar 18 1994	G	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided

No. 93-880-CSX

Entry	Date	Note	Proceedings and Orders
			argument filed.
23	Mar 21 1994		Motion of American Federation of Labor and Congress of Industrial Organizations for leave to file a brief as amicus curiae GRANTED.
25	Mar 24 1994		Opposition of petitioners to motion of the Solicitor General for leave to participate in oral filed.
27	Apr 1 1994	X	Brief amici curiae of National Abortion Federation, et al. filed.
28	Apr 1 1994		LODGING consisting of two documents received from amici curiae National Abortion Federation, et al.
29	Apr 1 1994	X	Brief amici curiae of Florida, et al. filed.
30	Apr 1 1994	X	Brief amici curiae of People for the American Way, et al. filed.
31	Apr 1 1994	X	Brief amicus curiae of United States filed.
32	Apr 1 1994	X	Brief amici curiae of American College of Obstetricians and Gynecologists, et al. filed.
33	Apr 1 1994	X	Brief amici curiae of NOW Legal Defense and Education Fund, et al. filed.
34	Apr 1 1994		LODGING consisting of 9 copies of a study entitled, "1993 Clinic Violence Survey Report", submitted by amici curiae NOW Legal Defense and Education Fund,et al.
35	Apr 1 1994	X	Brief amicus curiae of Center for Reproductive Law & Policy, et al. filed.
36	Apr 1 1994	X	Brief of respondents Women's Health Center, Inc., et al. filed.
26	Apr 4 1994		Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
37	Apr 13 1994	X	Reply brief of petitioners filed.
38	Apr 26 1994		LODGING by respondents. Video "Anti-Abortion Protest"
39	Apr 28 1994		ARGUED.

93-880

Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

(1)

No.____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

JUDY MADSEN, ED MARTIN, and SHIRLEY HOBBS,
Petitioners,

v.

WOMEN'S HEALTH CENTER, INC.,
AWARE WOMEN CENTER FOR CHOICE, INC.,
EPOC CLINIC, INC., and CENTRAL FLORIDA
WOMEN'S HEALTH ORGANIZATION, INC.,
Respondents.

Petition for Writ of Certiorari to the Supreme Court of Florida

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a state court injunction placing a thirty-six-foot buffer zone around an abortion clinic which prohibits peaceful pro-life speech in a traditional public forum is an unconstitutional content-based restriction on free speech and association.

2. Whether a state court injunction creating a consent requirement before speech is permitted within a three-hundred-foot buffer zone around an abortion clinic and residential areas is a reasonable time, place, and manner restriction or an unconstitutional prior restraint on free speech.

3. Whether a state court injunction prohibiting named demonstrators and those acting "in concert" from expressing peaceful speech within several designated buffer zones violates the First Amendment's protection of freedom of speech and association.

PARTIES TO THE PROCEEDINGS AND RULE 29.1 STATEMENT

In addition to the Petitioners listed in the caption, Operation Rescue, Patrick Mahoney, Randall Terry, Bruce Cadle, Operation Rescue America, and Operation Goliath were listed as parties in the Supreme Court of Florida, but did not present oral argument. None of the Petitioners are active corporations.

The Respondents are all incorporated in Florida and do not have parent or subsidiary companies.

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B. *Women's Health Center, Inc. v. Operation Rescue*, No. 91-2811-CA-16-K (Fla. Cir. Ct. Oct. 25, 1993), Amended Permanent Injunction B-1

C. *Cheffer v. McGregor*, No. 93-2407 (11th Cir. Oct. 20, 1993) (1993 WL 416820), Opinion C-1

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

JUDY MADSEN, ED MARTIN, and SHIRLEY HOBBS,

Petitioners,

v.

WOMEN'S HEALTH CENTER, INC., AWARE WOMEN CENTER FOR CHOICE, INC., EPOC CLINIC, INC., and CENTRAL FLORIDA WOMEN'S HEALTH ORGANIZATION, INC.,

Respondents.

Petition for Writ of Certiorari to the Supreme Court of Florida

PETITION FOR WRIT OF CERTIORARI

Judy Madsen, Ed Martin and Shirley Hobbs respectfully petition for a writ of certiorari to review the judgment of the Supreme Court of Florida.

OPINIONS BELOW

The opinion of the Supreme Court of Florida is not yet reported, but is reproduced as Appendix A. *Operation Rescue v. Women's Health Center, Inc.*, No. 81,905 (Fla. Oct. 28, 1993).

The opinion of the Eighteenth Judicial Circuit of Florida granting the Amended Permanent Injunction challenged herein was not reported, but is reproduced as Appendix B. *Women's Health Center, Inc. v. Operation Rescue*, No. 91-2811-CA-16-K (Fla. Cir. Ct. Oct. 25, 1993).

STATEMENT OF JURISDICTION

The opinion of the Supreme Court of Florida was entered on October 28, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(a).

CONSTITUTIONAL PROVISION AND INJUNCTION AT ISSUE

This case involves the First Amendment to the United States Constitution, which provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for redress of grievances.

U.S. Const. amend. I.

This case presents constitutional challenges to the Eighteenth Judicial Circuit of Florida's Amended Permanent Injunction

reproduced as Appendix B.[1]

STATEMENT OF THE CASE

A. The Decision of the Supreme Court of Florida

This case challenges the constitutionality of an Amended Permanent Injunction (hereinafter "Injunction") (App. B) entered on April 8, 1993 by the Honorable Robert B. McGregor, Circuit Judge in the Eighteenth Judicial Circuit of Florida, against the Petitioners, and those acting "in concert" with the Petitioners.

The Respondents in this case are all abortion businesses located in Central Florida. The Petitioners named in the challenged Injunction are opposed to abortion. Certain individuals demonstrated outside the Respondents' clinics and expressed their opposition to abortion. Petitioners Madsen, Martin and Hobbs were not associated with those protesters blocking the clinics or with Operation Rescue. Respondents requested injunctive relief enjoining the Petitioners and others from trespassing, blocking or obstructing ingress into or egress from the Respondents' abortion facilities.

On October 21, 1991, Women's Health Center, Inc., Aware Woman Center For Choice, Inc.,[2] EPOC Clinic, Inc., and Central Florida Women's Health Organization, Inc. (hereinafter "Respondents") filed a Verified Petition for Injunction in the

---

[1] On April 15, 1993, the Florida circuit court entered a Modification of the Amended Permanent Injunction. The only provisions modified from the Amended Permanent Injunction entered April 8, 1993 concern the procedures for enforcement of the Amended Permanent Injunction by law enforcement personnel.

[2] The challenged Injunction only applies to the Aware Woman Center for Choice, Inc. located at the corner of U.S. Hwy. 1 and Dixie Way in Melbourne, Florida.

Circuit Court of the Eighteenth Judicial Circuit in and for Seminole County, Florida seeking a permanent injunction against Operation Rescue, Operation Rescue America, Operation Goliath, Ed Martin, Bruce Cadle, Pat Mahoney, Randall Terry, Judy Madsen and Shirley Hobbs (Judy Madsen, Ed Martin and Shirley Hobbs are hereinafter "Petitioners").

On October 25, 1991, the Respondents filed a Verified Motion for Temporary Restraining Order (hereinafter "TRO"). The court entered an Order granting the TRO on October 25, 1991. On December 6, 1991, the Petitioners filed a Motion to Dissolve the TRO. The Respondents then filed a Motion for Permanent Injunction on December 31, 1991. The Petitioners filed an Answer to the Verified Petition for Injunction on January 15, 1992. In their Answer, the Petitioners raised as an affirmative defense the Petitioners' rights of free speech and assembly under the United States Constitution. On January 27, 1992, the court denied the Petitioners' Motion to Dissolve the TRO.

On July 13, 1992, the court entered an Order requiring the parties to submit a stipulation of issues and facts and memorandum of law within thirty days. The court indicated that it would base its ruling upon the factual stipulation, affidavits filed by the parties, and the memoranda of law. On September 30, 1992, the court entered an Order granting a Permanent Injunction against the Petitioners. The Order stated:

> A. [Petitioners], OPERATION RESCUE, OPERATION RESCUE AMERICA, OPERATION GOLIATH, Ed Martin, Bruce Cadle, Pat Mahoney, Randall Terry, Judy Madsen, and Shirley Hobbs,[3] are hereby enjoined from:
>
> 1) trespassing on, sitting in, blocking, impeding or

[3] The Permanent Injunction entered on September 30, 1993 did not address those acting "in concert" and was therefore limited to those named in that injunction.

> which abortions are performed in Brevard and Seminole County, Florida; and,
>
> 2) physically abusing persons entering, leaving, working or using any services of any facility at which abortions are performed in Brevard and Seminole County, Florida; and,
>
> 3) attempting or directing others to take any of the actions described in Paragraphs 1 and 2 above.
>
> B. Nothing in the Court's Order should be construed to limit [Petitioners'] exercise of their legitimate First Amendment rights, such as, but not limited to, carrying signs, singing, and praying, in a manner which does not violate 1), 2), and 3) above;
>
> C. This Court retains jurisdiction for determination of any costs to be imposed upon [Petitioners].[4]

On March 22, 1993, the Respondents moved for a modification of the Permanent Injunction. From March 31, 1993 through April 2, 1993 the court conducted an evidentiary trial on the Respondents' Motion for Sanctions and Modification of the Permanent Injunction recited above. The Aware Woman Center For Choice, Inc. (hereinafter "Clinic") was the only facility in question at the evidentiary hearing. On April 8, 1993, following the evidentiary proceedings, Judge McGregor entered the Amended Permanent Injunction (App. B) which is the subject of this Petition for Writ of Certiorari.

The undersigned counsel filing this Petition for Writ of Certiorari filed the first Notice of Appeal challenging the Amended

[4] The Permanent Injunction entered September 30, 1993 is not challenged.

Permanent Injunction. On April 27, 1993, the Fifth District Court of Appeal of Florida entered an Order granting the Petitioners' Motion to Expedite the Appeal filed by the undersigned counsel. Subsequent to the action of the undersigned counsel, a second group of petitioners filed their own separate appeal. On June 4, 1993, a motion to consolidate the separate appeals was filed with the Fifth District Court of Appeal.

The Petitioners' briefs argued that the Injunction was content-based, created a complete ban on pro-life speech in a traditional public forum, and created vague and overbroad restrictions on freedom of speech and association in violation of the Petitioners' First Amendment rights. On June 9, 1993, the Supreme Court of Florida accepted certification of the case from the Fifth District Court of Appeal as a matter of great public importance. On August 31, 1993, the undersigned counsel presented oral argument, and on October 28, 1993, the Florida Supreme Court issued its opinion, eight days after the Eleventh Circuit Court of Appeal's decision in *Cheffer v. McGregor*, No. 93-2407 (11th Cir. Oct. 20, 1993) (1993 WL 416820).

The Supreme Court of Florida, in *Operation Rescue v. Women's Health Center, Inc.*, No. 81,905 (Fla. Oct. 28, 1993) (App. A), concluded that the challenged Injunction was content neutral and therefore not subject to strict scrutiny as required in *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 103 S.Ct. 948, 74 L.Ed 2d 794 (1983). Although the court agreed that the Injunction encompassed a traditional public forum--public sidewalks, public streets, and public right-of-ways--the court concluded that the Injunction was content neutral and allowed time, place, and manner restrictions on free speech. The court maintained that the Injunction regulated not what the Petitioners might speak, but when, where, and how the Petitioners were to speak.

The court concluded that the Injunction only banned the Petitioners from entering the thirty-six-foot and three-hundred-foot

buffer zones. The court noted that the Injunction could have been narrowed, but declined to quibble over a few feet or over purely symbolic matters.

The court also discounted any challenge that the Injunction did not leave open ample alternative means of communication. Noting that speech was permitted outside the buffer zones and other public areas surrounding the Clinic, the court concluded that the Petitioners' message could be conveyed outside the buffer zones. In addition, because the court concluded that the Injunction was content neutral, it further determined that prior restraint challenges would not apply.

Finally, the court rejected any challenge based on vagueness or overbreadth. The court stated that "sounds or images observable to or within earshot of the patients inside the Clinic" was sufficiently specific to give proper notice of what would be considered illegal under the Injunction. As to overbreadth, the court stated that the phrase "in active concert or participation" would create no danger that the Injunction would be unfairly enforced.

In its summary, the court recognized without comment the case of *Cheffer*, wherein the United States Court of Appeals for the Eleventh Circuit ruled that the same Injunction violated free speech.[5]

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[5] The Appellees in *Cheffer* filed a Suggestion of Rehearing *En Banc* on November 9, 1993 on which the Eleventh Circuit has not ruled. Petitioners' Madsen, Martin and Hobbs desired to await the Eleventh Circuit's decision on the Appellees' motion for rehearing before submitting this Petition for Writ of Certiorari. However, on November 24, 1993, a petition was filed in this Court by other parties in the Florida court. In order to avoid prejudice to the Respondents and allow them an opportunity to respond fully to any petitions before this Court, Petitioners' Madsen, Martin and Hobbs file this petition.

B. The Decision of the United States Eleventh Circuit Court of Appeals

At the same time the Injunction was being challenged on the state level, a federal challenge was concurrently prosecuted in the case of *Cheffer v. McGregor*, No. 93-2407 (11th Cir. Oct. 20, 1993) (1993 WL 416820).[6] On April 13, 1993, Ms. Myrna Cheffer, represented by the same undersigned counsel for the Petitioners herein, filed a Complaint for Injunctive and Declaratory Relief, a Motion for a Temporary Restraining Order, and Motion for a Preliminary Injunction in the United States District Court for the Middle District of Florida challenging specific provisions of the Injunction. Cheffer also requested declaratory judgement to determine the constitutionality of certain provisions of the Injunction and whether the challenged provisions violated Cheffer's free speech and freedom of religion rights guaranteed under the First and Fourteenth Amendments to the United States Constitution. Although Ms. Cheffer was not a party in the state court Injunction, she feared arrest because the Injunction had been applied to anyone expressing a pro-life view through the phrase "in concert."[7]

On April 14, 1993, the District Court denied Cheffer's Motion for Temporary Restraining Order and Motion for

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[6] A similar strategy was taken in the case of *Macheskey v. Bizzell*, 414 F.2d 283 (5th Cir. 1969), wherein several state court defendants filed for injunctive relief in federal court against a state court injunction. In *Macheskey*, the state's injunction created a total ban on all picketing within a three-hundred-foot buffer zone around several businesses. In both *Cheffer* and *Macheskey*, the federal court provided protection against a state court's injunctive order which was overbroad and prohibited peaceful picketing within a traditional public forum.

[7] On April 12, 1993, Judge McGregor, addressing about fifty people who were arrested on April 10, 1993, two days after the Injunction was entered, stated that the Injunction applied to anyone with a pro-life belief.

Preliminary Injunction, holding that Cheffer failed to show that the balance of equities favored Cheffer in compelling the court to enjoin enforcement of the state court Injunction. On April 16, 1993, Cheffer filed a Notice of Appeal to the Eleventh Circuit Court of Appeals. The undersigned counsel presented oral argument before the Eleventh Circuit on June 30, 1993.

On October 20, 1993, the Eleventh Circuit entered an Order vacating the District Court's Order denying Cheffer's Motion for Temporary Restraining Order and Cheffer's Motion for Preliminary Injunction and remanded the case to the District Court for a new decision in light of Cheffer's First Amendment rights.

In *Cheffer*, the Eleventh Circuit held that the Injunction was a viewpoint-based restriction on free speech in a traditional public forum. The court stated:

> The order enjoins Operation Rescue, Operation Rescue America, Operation Goliath, their officers, agents, members, employees and servants, and Ed Martin, Bruce Cadle, Pat Mahoney, Randall Terry, Judy Madsen, and Shirley Hobbs, and all persons acting in concert or participation with them or on their behalf.... Such a restriction is no more viewpoint-neutral than one restricting the speech of "the Republican party, the state Republican party, George Bush, Bob Dole, Jack Kemp and all persons acting in concert or participation with them or on their behalf."

1993 WL 416820 at 6 (App. C-11-12).

The court noted that a viewpoint-specific restriction in a traditional public forum is unconstitutional unless it is necessary to serve a compelling state interest and it is narrowly drawn to achieve that end. In this instance, the court concluded that the Injunction did not meet either test. In sum, the court concluded: "The practical effect of this section of the Injunction was to assure

that while 'pro-life' speakers would be arrested, 'pro-choice' demonstrators would not." *Id.* (App. C-12).

The court noted that women were not prevented from obtaining abortions at the Clinic. The *Cheffer* court reasoned that the two rights which collided in this case were between an actual prohibition of speech and a potential hinderance of abortion rights. The court stated that should the lower federal court issue an Order barring enforcement of the Injunction, "it would promote only speech and expressive conduct, not assault, trespass, or destruction of property." 1993 WL 416820 at 6 (App. C-13).

Finally, the court declined to entertain an argument that the speech in this case was disruptive, discourteous, or offensive. Noting this Court's tradition of protecting First Amendment rights, *Cheffer* reaffirmed that "the fact that society may find speech offensive is not a sufficient reason for suppressing it. Indeed, if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection." *Id.* (App. C-14). To punctuate the point, the court affirmed that "[w]e protect much that offends in the name of free speech--we cannot refuse such protection to those who find abortion morally reprehensible." *Id.* (App. C-14).

REASONS FOR GRANTING THE WRIT

This case presents stark conflicts between the Supreme Court of Florida, the Eleventh Circuit, and the decisions of this Court and numerous other federal and state courts. On the same identical issue within the same jurisidiction comes two conflicting opinions. The City of Melbourne, Florida, is confused as to which ruling to follow.[8] The scope and importance of the ruling in this case is enormous, reaching far beyond the state of Florida, and will create a precedent which allows other states to impose broad restrictions

[8] *See* Appendices D and E.

on the peaceful expression of speech within a traditional public forum. Presently, several courts are attempting to resolve the questions presented in this Petition for Writ of Certiorari.[9] The Florida court summarily dismissed the reasoning of the Eleventh Circuit Court of Appeals' unanimous decision interpreting the identical language within the identical Injunction. The Florida court also refused to follow this Court's precedent and allowed an Injunction to stand which prohibits the peaceful expression of speech. A writ of certiorari should be issued to resolve these conflicts and provide direction for the people and courts of our nation.

I.

THE FLORIDA SUPREME COURT'S OPINION, THAT THE INJUNCTION IS NOT CONTENT-BASED AND DOES NOT VIOLATE FIRST AMENDMENT FREE SPEECH RIGHTS, IS IN DIRECT CONFLICT WITH THE OPINION OF THE ELEVENTH CIRCUIT COURT WHICH FOUND THE IDENTICAL INJUNCTION WAS CONTENT-BASED AND DID VIOLATE THE FIRST AMENDMENT.

The Florida Supreme Court's opinion is in direct conflict with

[9] *E.g., Planned Parenthood Shasta-Diablo, Inc. v. Williams*, 12 Cal. App. 4th 1817, 16 Cal. Rptr. 2d 540, *review granted*, 851 P.2d 774, 19 Cal. Rptr. 2d 492 (Cal. 1993); *Murray v. Lawson*, 264 N.J. Super. 17, 624 A.2d 3 (App. Div. 1993), *cert. granted*, 627 A.2d 1149 (N.J. 1993); *Boffard v. Barnes*, 264 N.J. Super. 11, 624 A.2d 1 (App. Div. 1993), *cert. granted*, 627 A.2d 1150 (N.J. 1993); *Horizon Health Center v. Felicissimo*, 263 N.J. Super. 200, 622 A.2d 891 (App. Div. 1993), *cert. granted*, No. 36,728 (N.J. 1993); *Planned Parenthood of the Rocky Mountains, Inc. v. Operation Rescue National*, No. 93-CV-4266 (Colo. Dist. Ct. 1993), *appeal filed*, No. 93-CA-1613 (Colo. Ct. App. 1993); *Woman's Health Center of Duluth v. Operation Rescue*, No. CO-93-601157 (Minn. Dist. Ct. 1993), *appeal filed*, No. C9-93-1776 (Min. Ct. App. 1993).

the Eleventh Circuit Court of Appeals' decision in *Cheffer v. McGregor*, No. 93-2407 (11th Cir. Oct. 20, 1993) (1993 WL 416820). Although both courts interpreted the same language within the same Injunction, the two courts came to diametrically opposite decisions. As stated by this Court in *Charles Dowd Box Co. v. Courtney*, 82 S.Ct. 519, 526 (1962), "'diversities and conflicts' may occur, no less among the courts of the eleven federal circuits, than among the courts of the several States . . . . To resolve and accommodate such diversities and conflicts is one of the traditional functions of this Court." Moreover, this Court stated in *Braxton v. United States*, 111 S.Ct. 1854, 1857 (1991), that a "principal purpose for which we use our certiorari jurisdiction . . . is to resolve conflicts among the Circuit Courts of Appeals and state courts . . . ." *See also Plumbers, Steamfitters, Refrigeration, Petroleum Fitters and Apprentices of Local 298, A. F. of L., et al. v. County of Door*, 79 S.Ct. 844 (1959); *State of California v. Taylor*, 77 S.Ct. 1037 (1957).

Initially, both courts recognized the Injunction affected a traditional public forum. Both courts agreed that if the Injunction was content-based it must satisfy the strict scrutiny standard. The two courts conflicted in that the federal decision utilized the higher standard of strict scrutiny while the Florida court applied a lesser standard under the content neutral analysis.

In both the state and federal cases, the same Injunction was applied to persons who neither violated the original September 30, 1992 Injunction, nor in any way attempted to block access to any clinic or act in an unlawful manner. Petitioners Madsen, Martin and Hobbs never participated in any disruptive activities or violated any laws. Likewise, Ms. Cheffer has never engaged in disruptive or illegal behavior.

Both the state and federal cases were brought by the same undersigned counsel. In both courts, the same evidence was presented and the same arguments were presented challenging the same language in the same Injunction. In *Cheffer*, the federal

court recognized that the content-based language in the Injunction proscribed protected free speech activities in a traditional public forum. The court noted that:

> Judge McGregor's Amended Permanent Injunction, by operating on persons not before this court, serves as a statute of local effect regulating picketing by antiabortion speakers. As a viewpoint-based restriction operating in a traditional public forum (the public streets and sidewalks around the Clinic), it is subject to a most stringent review.

1993 WL 416820 at 5 (App. C-10).

The *Cheffer* court noted that a viewpoint-specific restriction in a traditional public forum is unconstitutional unless it is necessary to serve a compelling state interest and it is narrowly drawn to achieve that end. In this instance, the court concluded that the Injunction did not meet either test. The court concluded: "The practical effect of [the "in concert"] section of the injunction was to assure that while 'pro-life' speakers would be arrested, 'pro-choice' demonstrators would not." *Id.* at 6 (App. C-12).

In direct conflict with the Florida Supreme court's opinion, the *Cheffer* court held that the Injunction was only applied to those with a pro-life view. "This is apparently precisely what occurred. Several of those arrested testified (at a preliminary hearing convened by Judge McGregor as provided for in the Injunction) that they were designated for arrest by Clinic workers and police officers because they were perceived to be 'pro-life'." *Id.* at 6 n.11 (App. C-12). The court found that

> Judge McGregor accepted this interpretation of the intent of the injunction and explained (to the arrestees): "[T]he injunction did not pertain to those on the other side of the issue, because the word in concert with means in concert with those who had taken a certain position in

> respect to the Clinic, adverse to the Clinic. If you are saying that is selective basis that the pro-choice were not arrested when pro-life was arrested, that's the basis of that selection."

Id. (App. C-12).

In contrast, the Florida court held that the Injunction was content neutral and simply created time, place and manner restrictions in a traditional public forum. Relying in part on the Ninth Circuit's opinion in *Portland Feminist Women's Health Center v. Advocates for Life, Inc.*, 859 F.2d 681 (9th Cir. 1988), the Florida court stated: "The restrictions make no mention whatsoever of abortion or any other political or social issue; they address only the volume, timing, location, and violent or harassing nature of Operation Rescue's expressive activity." Slip op. at 16. However, the *Cheffer* court specifically rejected such reasoning. In reviewing the Ninth Circuit's opinion in *Portland*, the *Cheffer* court noted that:

> The [Ninth Circuit] argued the preliminary injunction is not a content-based restriction of expression. It refers not at all to the specific viewpoints that the advocates press, nor even to the general issues raised at their demonstrations. . . . Therefore, we apply to the preliminary injunction the rules regarding the constitutionality of 'time, place, and manner' regulations of speech.

1993 WL 416820 at 6 n.10 (App. C-11).

Rejecting *Portland*, the *Cheffer* court concluded: "We do not find this reasoning at all persuasive." *Id.* (App. C-11).

The Florida Supreme court's opinion is in direct opposition to the Eleventh Circuit Court of Appeals' decision ruling on the same identical language in the challenged Injunction. This conflict

has created confusion as to which ruling is controlling. The City of Melbourne has refused to enforce the Injunction.[10] A writ of certiorari should be issued to resolve this conflict.

II.

THE FLORIDA SUPREME COURT'S OPINION IS IN DIRECT CONFLICT WITH THE JUDGMENT OF THE UNITED STATES SUPREME COURT, AND SEVERAL FEDERAL CIRCUIT AND STATE COURTS.

A. The Florida Supreme Court's Opinion Is In Direct Conflict With The Judgment Of The United States Supreme Court.

The Florida court's primary flaw is that it failed to distinguish the Petitioners' peaceful acts from other organizations and persons. Following from the example in the lower Florida court, the Florida Supreme court declined to separate the Petitioners' peaceful protest from those other persons alleged to have committed unlawful acts. For this reason, the Florida court's opinion is in direct conflict with this Court's judgment in *NAACP v. Claiborne Hardware*, 458 U.S. 886 (1982).[11]

The Florida Supreme Court's opinion was that the Injunction merely restrained speech when joined with unlawful conduct. On

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[10] *See* Appendices D and E. The Florida Supreme Court directs enforcement officials to apply the Injunction; the Eleventh Circuit demands they must not.

[11] The Florida Supreme court refused to recognized the Petitioners' arguments based on *Claiborne Hardware*, 458 U.S. 886 (1982). The Florida court considered *Claiborne Hardware* only as it related to the issue of damages. The Florida court expressly rejected any First Amendment arguments based on this Court's decision in *Claiborne Hardware*.

the face of the Injunction it is clear that lawful conduct and protected speech are also prohibited. The Injunction proscribes peaceful demonstrations and speech "or other sounds or images observable to or within earshot of the patients inside the Clinic." Thus, if a pro-life demonstrator can be seen or heard inside the Clinic, regardless of where the demonstrator is located or what type of activity and speech is taking place, the pro-life person is subject to immediate arrest without notice. In *Claiborne Hardware*, this Court held that in the context of protected speech or activities, the courts may "restrain **only unlawful conduct** and the **persons responsible for conduct** of that character." 458 U.S. at 924 n.67 (emphasis supplied).[12]

The facts in *Claiborne Hardware* are quite similar to the case before this Court. In March 1966, several hundred black persons implemented a boycott of white merchants following racial abuses in Claiborne County, Mississippi. The business merchants sued for injunctive relief against the demonstrators and Charles Evers, a leader of the movement, who "sought to persuade others to join

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[12] Historically, numerous federal and state courts have noted the distinction between prohibited illegal conduct and lawful speech protected under the First Amendment. *E.g.*, *National Organization for Women v. Operation Rescue*, 914 F.2d 582, 586 (4th Cir. 1990) (per curium) (affirming refusal to enjoin free speech surrounding abortion clinic that tended to "intimidate, harass, or disturb patients" in light of serious threat to First Amendment protections), *vacated on other grounds sub nom. Bray v. Alexandria Woman's Health Clinic*, 113 S.Ct. 753 (1993); *Mississippi Woman's Medical Clinic v. McMillan*, 866 F.2d 788 (5th Cir. 1989) (affirming lower court's denial of injunction enjoining pro-life demonstrations outside abortion clinics); *Planned Parenthood League of Massachusetts, Inc. v. Operation Rescue*, 406 Mass. 701, 550 N.E.2d 1361 (1990) (upholding injunction but limiting effect to prohibit only illegal activity, but not protected First Amendment activity); *O.B.G.Y.N. Ass'n. v. Birthright of Brooklyn and Queens, Inc.*, 64 A.D.2d 894, 407 N.Y.S.2d 903 (1978) (reversing injunction in part which restricted lawful free speech expression).

the boycott through pressure and the 'threat' of social ostracism." *Id.* at 909-10. Mr. Evers and other active members of the boycott furthered their cause by seeking to "embarrass" non-participants and "coerce them into action" and conformity. *Id.* at 910.

Additionally, the lower Mississippi court found that some defendants, acting for all others, became involved in "acts of physical force and violence" against potential customers and used "[i]ntimidation, threats, social ostracism, vilification, and traduction" to achieve their desired results. *Id.* at 894. "In two cases, shots were fired at a house; in a third, a brick was thrown through a windshield; . . . and a group of young blacks apparently pulled down the overalls of an elderly brick mason known as 'Preacher White' and spanked him for not observing the boycott." *Id.* at 904-05.

Momentum was added to the boycott following the assassination of Dr. Martin Luther King, Jr. on April 4, 1968 and "[t]ension in the community neared a breaking point" on April 18, 1969 after the shooting of a local black man. *Id.* at 901-02. Nevertheless, coinciding with the escalation in activities was the continuous "uniformly peaceful and orderly" picketing of the white-owned businesses which often involved small children and occurred "primarily on weekends." *Id.* at 903.

The Mississippi Supreme Court upheld the permanent injunction entered below which

> permanently enjoined [the demonstrators] from stationing 'store watchers' at the [merchants'] business premises; from 'persuading' any person to withhold his patronage from [the merchants]; from 'using demeaning and obscene language to or about any person' . . . ; [and] from 'picketing or patrolling' the premises of any of the [merchants]. . . .

Id. at 893.

The Supreme Court of Mississippi approved the injunction on the theory that the "petitioners had *agreed* to use force, violence, and 'threats' to effectuate the boycott." *Id.* at 895. The court reasoned that "[i]f any of these factors--force, violence, or threats--is present, then the entire boycott is illegal regardless of whether it is primary, secondary, economical, political, social or other." *Id.* at 895.

This Court reversed the Supreme Court of Mississippi and dissolved the injunction reasoning that every element of the boycott was "a form of speech or conduct that is ordinarily entitled to protection under the First and Fourteenth Amendments." *Id.* at 907. This Court emphasized that "precision of regulation" is demanded when "conduct occurs in the context of constitutionally protected activity." *Id.* at 916. This Court declared that the injunction "must be dissolved" or "modified to restrain **only unlawful conduct** and the **persons responsible** for conduct of that character." *Id.* at 924 n.67 (emphasis supplied).

The Supreme Court of Florida's decision is in direct conflict with this Court's judgment in *Claiborne Hardware* because the Injunction broadly prohibits all demonstrating within the designated buffer zones, including peaceful picketing and speech. The Florida court declined to recognize that the Injunction proscribes both lawful and unlawful speech or activity by the language prohibiting the peaceful display of "images observable to" persons inside the Clinic.[13] In application, the Injunction eviscerates the Petitioners' First Amendment right to peacefully picket. As stated in

[13] Applying this language, the clinic personnel become the enforcers of the Injunction with the use of a simple photograph. When a person standing within the clinic takes the picture of a pro-life person standing outside the clinic, the pro-life person outside the clinic is in violation of the Injunction. In this circumstance, the Injunction reaches beyond the thirty-six-foot buffer zone and out into the far reaches of the camera's lens and indiscriminately prosecutes without regard to the activity's peaceful nature.

Claiborne Hardware, some individuals did more than assemble peacefully, but "[o]ther elements of the [demonstration] . . . also involved activities ordinarily safeguarded by the First Amendment." *Id.* at 909.

Although the Florida court attempts to associate the Petitioners with numerous unlawful acts and actors,[14] the Respondents' stipulation clearly reveals their agreement that Petitioners Judy Madsen, Ed Martin and Shirley Hobbs have never blocked access to the Clinic. The Florida court ignores this crucial fact and repeatedly claims that "Operation Rescue" (apparently referring to one or another of the named organizations or some unknown individual) committed some unlawful or onerous act.[15]

The Florida Supreme court's decision is also in conflict with the principles of free speech and association established by this Court. "The established elements of speech, assembly, association, and petition, 'though not identical, are inseparable.'" *Thomas v. Collins*, 323 U.S. 516, 530 (1945). "[T]he practice of persons sharing common views banding together to achieve a common end is deeply embedded in the American political process." *Citizens Against Rent Control Coalition for Fair Housing v. Berkley*, 454 U.S. 290, 294 (1981). In emphasizing the importance of free association to guarantee the right to be heard, Justice Harlan wrote:

[14] The Florida courts repeatedly characterized Operation Rescue as a radical, violent gang roaming the counties seeking opportunities to inflict harm and incite fear in others. Even if this were true, it is improper to affiliate Petitioners Madsen, Martin and Hobbs with this activity when the Respondents admit these Petitioners never violated any laws or blocked any clinic.

[15] In light of the Florida court's continued assertion that the Injunction addresses only those acting "in concert," this Court should perceive that the Injunction is indeed content-based and therefore unconstitutional because it does not satisfy a strict scrutiny standard.

> Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly.

NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 460 (1958).

As did the Supreme Court of Mississippi in *Claiborne Hardware*, the Supreme Court of Florida claims the Injunction is required to protect various state interests which were jeopardized by activity at the Clinic. However, as this Court stated in *Claiborne Hardware*, "[t]he right to associate does not lose all constitutional protection merely because some members of the group may have participated in conduct or advocated doctrine that itself is not protected." *Id.* at 908. This Court stated that a "'blanket prohibition of association with a group having both legal and illegal aims' would present 'a real danger that legitimate political expression or association would be impaired.'" *Scales v. United States*, 367 U.S. 203, 229 (1961).

In *De Jonge v. Oregon*, 299 U.S. 353 (1937), this Court unanimously held that "peaceful assembly for lawful discussion cannot be made a crime." *Id.* at 365. The Florida Supreme court concluded that the Injunction was necessary because the "[Petitioners] never sought to obey the [September 30, 1992] injunction" and continued in unlawful activity such as attempting to block ingress and egress to the Clinic;[16] pushing literature into the windows of passing cars;[17] picketing residences of Clinic

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[16] The Florida circuit court based this conclusion on the assertion that unnamed and unknown persons, who were acting "in concert" with the named Petitioners, violated the September 30, 1992 injunction.

[17] The Melbourne Police Chief admitted the least drastic means to restrict this activity is enforcement of the Florida traffic regulations related to literature distribution into moving vehicles.

personnel;[18] and inciting fear through threat and intimidation while quoting the statement, "I pray that God strikes you dead now!"[19]

However, the Respondents clearly stipulated that Judy Madsen, Ed Martin and Shirley Hobbs never physically blocked access to any abortion clinic. Moreover, the September 30, 1992 Injunction did not even address distribution of literature into moving vehicles or residential picketing. The Florida court continually confused and misconstrued the association of the Petitioners with other organizations.[20] From this

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[18] In *Frisby v. Schultz*, 487 U.S. 474 (1988), this Court carved out for the unwilling listener a residential privacy exception allowing some limitation on First Amendment free speech. However, this Court acknowledged the constitutionality of residential picketing. The Florida court's reliance on *Northeast Woman's Center, Inc. v. McMonagle*, 939 F.2d 57 (3d Cir. 1991), is in error because the Injunction sub judice prohibits "approaching . . . the residence . . . of any 'owners or agents' of the clinic." Because the names and addresses of clinic personnel are not available, this creates a restriction on a pro-life person's ability to walk through any and all residential neighborhoods without fear of violating the Injunction.

[19] In *Watts v. United States*, 394 U.S. 705 (1969), the petitioner was convicted of willfully making a threat to take the life of the President. He stated: "If they ever make me carry a rifle the first man I want to get in my sights is L.B.J." *Id.* at 706. This Court reversed the conviction and agreed that "the statement, taken in context, was 'a kind of very crude offensive method of stating a political opposition to the President.'" *Id.* at 708.

[20] The Florida courts mistakenly associated the "Petitioners" as working "in concert" with Operation Rescue, Operation Rescue National, IMPACT, Rescue America, Operation Rescue America National, and Operation Goliath. Although the Florida courts concluded that the Petitioners before this Court were associated with "Operation Rescue," and frequently cite to that organization, no evidence was ever presented

misinterpretation, the Florida court launched into accusations of events performed by unnamed and unknown individuals and attributed all such occurrences to the Petitioners before this Court. In actuality, the Respondents agreed in the lower Florida court that there was considerable difficulty in determining the actors and their relation to one another or any other association.

The Florida Supreme court's true error is that it imputed the conduct of individuals acting alone to the Petitioners. Rather than examine the lower Florida court's record and separate those known to have acted unlawfully from the Petitioners and their peaceful speech, the Florida Supreme court's opinion routinely designates anyone performing an act which is perceived as associated with pro-life belief as "acting in concert" with other organizations.

The Florida court's sentiment that the Injunction only proscribes the activities of those "acting in concert" with the Petitioners begs for the conclusion that the Injunction is content-based. In fact, Judge McGregor, in applying the Injunction, stated that when he issued the Injunction he intended it to **only prohibit pro-life speech**.

The Florida court simply confused the Petitioners before this Court with other unnamed and unknown individuals. Rather than make an attempt to determine who actually violated the law, the Florida court amassed all persons with a pro-life belief into one organization regardless of whether that person had ever committed any unlawful act. Because the Injunction prohibits pro-life expression, such as singing, chanting, images observable or sounds within earshot, it is clearly content-based. Prohibition of unlawful activities is objective, but a complete ban prohibiting expression causes the Petitioners to be lumped together with alleged unlawful acts of others. This Court has clearly stated that "[f]or liability to be imposed by reason of association alone, it is necessary to

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linking the Petitioners to that group in any way.

establish that the group itself possessed unlawful goals and that the individual held a specific intent to further those illegal aims." *Claiborne Hardware*, 458 U.S. at 920.

The Injunction clearly prohibits the association and free expression of pro-life, but not pro-choice, demonstrators. As stated by the Eleventh Circuit in *Cheffer*: "The practical effect of [the "in concert"] section of the injunction was to assure that while 'pro-life' speakers would be arrested, 'pro-choice' demonstrators would not." 1993 WL 416820 at 6 (App. C-12). The Injunction is content-based and imputes the unlawful acts of other unnamed and unknown individuals to the "Petitioners" and all others acting "in concert." As this Court stated in *Noto v. United States*, 367 U.S. 290 (1961), intent to act unlawfully

> must be judged 'according to the strictest law,' for 'otherwise there is danger that one in sympathy with the legitimate aims of . . . an organization, but not specifically intending to accomplish them by resort to violence, might be punished for his adherence to lawful and constitutionally protected purposes, because of other and unprotected purposes which he does not necessarily share.

367 U.S. 290, 299-300 (1961).

Such a content-based Injunction is clearly unconstitutional because it creates unlawful class distinctions[21] and then prevents that class from exercising its right to associate or peacefully express its political views. As stated by this Court in *Citizens Against Rent Control*: "There are, of course, some activities, legal if engaged by one, yet illegal if performed in concert with others,

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[21] The specific classification is directed at those individuals who hold to a pro-life view. The Injunction specifically prohibits sidewalk counseling, singing, and would also prohibit prayer.

but political expression is not one of them." 454 U.S. at 296. "[T]he Court has consistently disapproved governmental sanctions or denying rights and privileges solely because of a citizen's association with an unpopular organization." *Healy v. James*, 408 U.S. 169, 185-86 (1972).

The Florida court's decision also conflicts with this Court's precedent regarding prior restraints on free speech. The Florida court held that the doctrine of prior restraints does not apply unless an injunction addresses content-based restrictions on speech. The Florida court's holding is in direct conflict with the precedent set by this Court.

In *Organization For A Better Austin v. Keefe*, 402 U.S. 415, 417 (1971), this Court held that an injunction which prohibited the distribution of "leaflets or literature of any kind, and from picketing" was an unconstitutional prior restraint. "Any prior restraint on expression" carries with it a "'heavy presumption' against its constitutional validity." *Id.* at 419. This Court's decision in *Keefe* was reaffirmed in the recent case of *Alexander v. United States*, 113 S.Ct. 2766 (1993). In *Alexander*, this Court reasoned that "permanent injunctions are classic examples of prior restraints." *Id.* at 2771. The Florida Court refused to follow this Court's teaching in *Keefe* and *Alexander* and allowed an Injunction banning pro-life speech within a traditional public forum to stand. By requiring consent before speech is allowed within the three-hundred-foot buffer zones, the Injunction creates a prior restraint on peaceful free speech. Rather than recognize the Injunction as a classic example of a prior restraint, the Florida Supreme Court held the Injunction was content neutral and refused to apply the doctrine of prior restraint.

The Florida Supreme Court expressly declined to separate the Petitioners' peaceful protest from those other persons alleged to have committed unlawful acts. Therefore, the Florida court's opinion is in direct conflict with this Court's judgment in *Claiborne Hardware* and numerous other decisions of this Court

protecting free speech and association. For this reason, a writ of certiorari should be issued to resolve this conflict.

B. The Florida Supreme Court's Opinion Is In Direct Conflict With The Judgments Of The Fourth, Fifth, Eighth and Tenth Circuit Courts of Appeals.

The Florida Supreme Court's decision is in direct conflict with the Fourth Circuit Court of Appeals' opinion in *National Organization for Women v. Operation Rescue*, 914 F.2d 582 (4th Cir. 1990), which held that an injunction prohibiting blockading or obstructing ingress or egress of abortion clinics could not be broadened in scope to prohibit intimidation, harassment, or disturbance of clinics' patients or potential patients. The Fourth Circuit Court of Appeals held that such an overbroad scope "would risk enjoining activities clearly protected by the First Amendment." *Id.* at 586. The court further noted that the pro-life demonstrators also sought to "persuade women not to seek the services of abortion clinics and to 'impress upon members of society' the moral rightness and intensity of their opposition to abortion." *Id.* The Fourth Circuit affirmed the district court's decision to limit the injunction in a manner that would not interfere with protected First Amendment activity.

In contrast, the Florida Supreme court upheld the challenged Injunction partly based on its reasoning that broader restraint was necessary to protect the Clinic's patients from harassment and intimidation. As stated by the Fourth Circuit, such a broad scope within an injunctive order clearly violates the First Amendment. The Respondents repeatedly stipulated that the Petitioners never blocked access or obstructed ingress or egress of the Clinic. Rather, the Petitioners sought to persuade women not to seek the services of the Clinic due to the Petitioners' belief that abortion is morally improper. As stated by the Fourth Circuit, persons are clearly protected under the First Amendment when expressing speech which attempts to persuade others and seeks to "impress upon members of society" the moral rightness and intensity of

opposition to abortion. *Id.* at 586. The Florida Supreme court's decision is in conflict with the Fourth Circuit's opinion because it approves an overbroad Injunction which prohibits peaceful speech which attempts to persuade others.

The Florida Supreme Court's decision is in direct conflict with the Fifth Circuit Court of Appeals' opinion in *Mississippi Women's Medical Clinic v. McMillan*, 866 F.2d 788 (5th Cir. 1989). In *McMillan*, the Fifth Circuit denied an abortion clinic's request for an injunction which would prohibit pro-life speech within a five-hundred-foot buffer zone around the clinic. The clinic had requested that the court impose time, place, and manner restrictions upon the pro-life demonstrators. The court refused to grant the injunction, noting that women were not denied the right to receive an abortion at the clinic. The Fifth Circuit agreed with the district court's decision that "granting the injunction would be substantially more likely to infringe on First Amendment rights than denying the injunction would be to result in a denial of privacy rights." *Id.* at 795. The Fifth Circuit concluded that the clinic was truly arguing

> that potential patients are being denied a supposed right not to hear speech that they do not wish to hear. Such a right, in a public forum, would be a most unusual one. To argue any other theory of the case--such as that women are being denied the substantive right to an abortion because of the 'atmosphere created,' (despite the fact that women are receiving abortions and that no one is being restrained)--would be to eviscerate the First Amendment.

McMillan, 866 F.2d at 794.

The *McMillan* decision mirrors the reasoning in *Cheffer*. As in *McMillan*, the *Cheffer* court noted that "there is no indication in the record that women were actually prevented from obtaining abortions at the Aware Woman Center for Choice. The clash here

is between an actual prohibition of speech and a potential hindrance to the free exercise of abortion rights." 1993 WL 416820 at 6 (App. C-13). The *Cheffer* court stated that should the lower federal court issue an Order barring enforcement of the Injunction, "it would promote only speech and expressive conduct, not assault, trespass, or destruction of property." *Id.* (App. C-13).

The *McMillan* decision reaffirmed the importance of protected, peaceful First Amendment speech in a traditional public forum. In conclusion, the Fifth Circuit held that "in a polity where the people are sovereign, informed choice enhances responsible decision-making. Neither we nor the clinic can cut off the peaceful communication of information, distasteful to some so it be." *Id.* at 795. The Florida Supreme court seriously erred in upholding an Injunction which fails to recognize the right of peaceful First Amendment speech. The Florida court's decision is in direct conflict with the Fifth Circuit Court of Appeals.

The Florida Supreme Court's decision is in direct conflict with the Eighth Circuit's opinion in *United Food & Commercial Workers International Union v. IBP, Inc.*, 857 F.2d 422 (8th Cir. 1988). In *IBP*, several unions brought a declaratory action to have provisions of a state mass picketing statute declared unconstitutional. The Eighth Circuit Court of Appeals held that the statute which prohibited more than two picketers within fifty feet of an entrance to the named premises was overbroad and violated the demonstrators' First Amendment rights. In light of the statute's overbroad application to protected First Amendment activities, the Eighth Circuit held the statute unconstitutional. In contrast with *IBP*, the Florida Supreme court's decision allows an Injunction to stand which on its face and in application prohibits protected First Amendment activity. Therefore, because the challenged Injunction creates a ban on all pro-life speech within the buffer zone surrounding the Clinic, the Injunction unconstitutionally violates the Petitioners' First Amendment right to peaceful protest in a traditional public form.

The Florida Supreme Court's decision is in direct conflict with the Tenth Circuit Court of Appeals' opinion in *Cannon v. City and County of Denver*, 998 F.2d 867 (10th Cir. 1993). In *Cannon*, numerous pro-life demonstrators were arrested for carrying signs on a sidewalk in front of an abortion clinic reading, "The Killing Place". The Tenth Circuit Court of Appeals reversed the lower court and held that the right of the protestors to picket on the public sidewalk in front of the clinic was a "clearly established constitutional right." *Id.* at 874. The court further noted that signs reading, "The Killing Place", were not "fighting words" and were not likely to provoke a violent reaction. The court held that such expressive activity was clearly protected by the First Amendment and the protestors possessed a constitutional right to picket on public sidewalks without fear of arrest.

In contrast, the Florida Supreme court's decision prohibits peaceful pro-life demonstrations on a public sidewalk and public right-of-ways which have traditionally been held open for free exercise of expressive activities and association. In light of the Injunction's overbroad application in prohibiting pro-life activities within the sidewalk and right-of-ways surrounding the Clinic, the Florida Supreme court's decision to uphold the Injunction is in direct conflict with the Tenth Circuit's opinion in *Cannon*.

The Florida Supreme court's decision is in direct conflict with the Fourth, Fifth, Eighth and Tenth Circuit Courts of Appeals. A writ of certiorari should be granted to resolve these conflicts.

C. The Florida Supreme Court's Opinion Is In Direct Conflict With The Judgment Of Several State Courts.

The Florida Supreme court's decision to uphold an absolute ban on free speech within a traditional public forum is in direct conflict with other state courts. In *Planned Parenthood League of Massachusetts, Inc. v. Operation Rescue, et al.*, 406 Mass. 701, 550 N.E.2d 1361 (Mass. 1990), the Supreme Court of Massachusetts followed this Court's precedent set in *NAACP v.*

Claiborne Hardware Co., 458 U.S. 886 (1982), noting: "When issuing an injunction, a judge must differentiate between legal and illegal expressive activity, and must carefully tailor the injunction to avoid unconstitutionally infringing on activity protected by the First Amendment." *Id.* at 1369. In *Planned Parenthood*, the court stated that an injunction can be issued to prevent illegal blocking of ingress or egress of the clinic property. However, the court further noted that other activities by the pro-life demonstrators were protected by the First Amendment. "Clearly, some of the defendants' activities at the protest, such as singing and chanting on public sidewalks, are protected, expressive activity." *Id.* In contrast with the Massachusetts court, the Florida Supreme court declined to follow this Court's ruling in *Claiborne Hardware*. Therefore, the Florida court's opinion is in direct conflict with the Supreme Court of Massachusetts.

The Florida Supreme court's decision is in direct conflict with *Parkmed Co. v. Pro-Life Counseling, Inc.*, 91 A.D.2d 551, 457 N.Y.S.2d 27 (1982). In *Parkmed*, the Supreme Court, Appellate Division of New York, modified the injunctive order of the lower court which prohibited peaceful free expression in a quasi-public area. The court ruled that "the injunction, in precluding the defendant's 'from demonstrating, picketing and in any interfering . . . on the . . . plaza area and on its steps' was overly broad and unnecessarily restricted peaceful picketing and demonstrating in a quasi-public area." *Parkmed*, 91 A.D.2d at 552. Although the court recognized that reasonable time, place, and manner regulations can be applied to protect significant governmental interests, such regulations cannot regulate the content of speech and must leave open reasonable alternative means of communication. The court further held that: "A sufficiently clear standard must be set so that the parties are apprised of the type and degree of conduct restrained and a distinction is drawn between that conduct and lawful, peaceful demonstration so that the affected party is given a clear choice." *Id.*

In contrast with the New York court's reasoning in *Parkmed*,

the Florida Supreme court upheld an Injunction allowing a complete ban on lawful conduct and peaceful speech within a traditional public forum. In *Parkmed*, the New York court held that a complete ban of peaceful, nonviolent picketing and demonstrating in a public forum was unconstitutional. Therefore, the Florida Supreme Court's decision is in direct conflict with the New York court.

The Florida Supreme court's decision is in direct conflict with several state courts. A writ of certiorari should be granted to resolve these conflicts.

CONCLUSION

In light of the reasons stated above, the Petitioners respectfully request this Court to issue a writ of certiorari to review the judgment and opinion of the Supreme Court of Florida.

Respectfully Submitted,

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December 3, 1993

APPENDICES

APPENDIX A

SUPREME COURT OF FLORIDA

No. 81,905

OPERATION RESCUE, OPERATION RESCUE AMERICA, OPERATION GOLIATH, ED MARTIN, BRUCE CADLE, SHIRLEY HOBBS, JUDY MADSEN, ET AL.,
Appellants,

v.

WOMEN'S HEALTH CENTER, INC., ET AL.,
Appellees.

Oct. 28, 1993.

Mathew D. Staver and Jeffery T. Kipi, Liberty Counsel, attorneys for Appellants Martin, Madsen, and Hobbs.
Talbot D'Alemberte and Susan A. England, attorneys for Appellees.

PER CURIAM.

We have for review a trial court order imposing an amended permanent injunction. The order has been certified by the district court as passing on an issue of great public importance requiring immediate resolution by this Court. We have jurisdiction. Art. V, § 3(b)(5), Fla. Const. We approve the order.

I. FACTS

Women's Health Center (Health Center) filed suit against Operation Rescue and others (Operation Rescue) seeking an injunction prohibiting that organization from engaging in certain activities against the Aware Woman Center for Choice (Clinic) in Melbourne, its patients, and staff. The court entered an order on October 25, 1991, granting a temporary injunction that imposed a number of restrictions.[1] Pursuant to the Health Center's request for permanent relief, the court directed the parties to submit a stipulation of issues and facts, which the parties did.[2] The court

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[1] The temporary injunction embraced the following restrictions:

1. All Respondents, the officers, directors, agents, representatives of Respondents, and all other persons, known and unknown, acting on behalf of any Respondents, or in concert with them, in any manner or by any means, are hereby enjoined and restrained from:

a) trespassing on, sitting on, blocking, or obstructing ingress into or egress from any facility in which abortions are performed or family planning services are provided in the County of Brevard and Seminole, and surrounding counties, State of Florida, of any person seeking access to or leaving those facilities;

b) physically abusing persons entering, leaving, working at or using any services at any facility in which abortions are performed or family planning services are provided, in the County of Brevard and Seminole, and surrounding counties, State of Florida;

c) attempting or directing others to take any of the actions described in paragraphs a) and b);

2. Nothing in this Court's Order should be construed to limit Respondents' exercise of their legitimate First Amendment rights, such as, but not limited to, carrying signs, singing, and praying, in a manner which does not violate a), b) and c) above . . . .

[2] The parties' stipulation included the following:

2. Operation Rescue America, Ed Martin, Judy Madsen and Shirley Hobbs are active in an organization known as "Operation Rescue America." In other

subsequently granted long-term relief, entering a permanent injunction nearly a year later, on September 30, 1992, based on a number of findings of fact[3] and imposing several general

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areas of the United States, this effort has been directed towards closing down abortion clinics throughout the country to save unborn children. Respondents desire is to close down "abortion mills" by various means. Operation Rescue America, Ed Martin, Judy Madsen and Shirley Hobbs well understand that peacefully blocking access to the facilities might constitute a trespass that is punishable by criminal penalties. They feel a violation of such a criminal statute is justified by their belief that protection of the unborn may merit breaking the criminal trespass laws.

. . . .

6. Respondents have passed out flyers in the Central Florida area stating their desire to close down abortion clinics in this area. One of the flyers states that the demonstrations will be held in the Central Florida area.

7. Respondent Ed Martin has made statements that his desire is to close all abortion clinics in the Central Florida area. Ed Martin has stated to members of press that he would love to shut down all abortion clinics. Ed Martin has issued a press release which states that "the spirit of [massive anti-abortion demonstrations in] Wichita comes to Florida."

[3] The trial court made the following findings of fact:

2. Respondents are individuals and organizations, acting in concert, who have planned a nationwide campaign, which they call "OPERATION RESCUE" (hereinafter, "OPERATION"), directed towards closing down abortion clinics and providers throughout the country. Respondents' own literature states that their intention is to "Physically close down abortion mills" by encircling them with thousands of protesters and blocking access to the facilities. Operation Goliath is dedicated to similar principles.

. . . .

5. Ed Martin and Pat Mahoney have stated an intent to prevent persons from obtaining abortions in the Brevard and Seminole County area by blocking access to clinics.

6. Respondents have passed out flyers in the Central Florida area stating an

restrictions.[4]

Nearly six months later, after taking evidence and listening to extensive live testimony in a three-day evidentiary hearing, the trial court determined its prior restrictions had proved insufficient "to protect the health, safety and rights of women in Brevard and Seminole County, Florida, and surrounding counties seeking access to [medical and counseling] services." Accordingly, the court on

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intent to close down abortion clinics in this area.

7. Respondent, Pat Mahoney, was a leader in the Wichita, Kansas protests. Respondents, Ed Martin and Pat Mahoney, have made statements that there will be or may be a blocking of the entrance to an abortion clinic in the Central Florida area. Pat Mahoney and Martin have stated to members of the press that they intend to shut down a clinic, and have issued a press release which states that "the spirit of Wichita comes to Florida." The press release also contained information that the Reverend Ed Martin of Ocala announces an "Operation Rescue" for Central Florida.

8. Literature obtained from Rescue America states that their members should ignore the law of the State and the police officers who remove them from their blockading positions.

[4] The permanent injunction contained the following general restrictions:

A. Respondents, OPERATION RESCUE . . . are hereby enjoined from:

1. trespassing on, sitting in, blocking, impeding or obstructing ingress into or egress from any facility at which abortions are performed in Brevard and Seminole County, Florida;

2. physically abusing persons entering, leaving, working or using any services of any facility at which abortions are performed in Brevard and Seminole County, Florida; and,

3. attempting or directing others to take any of the actions described in Paragraphs 1 and 2 above.

B. Nothing in this Court's Order should be construed to limit Respondents' exercise of their legitimate First Amendment rights, such as, but not limited to, carrying signs, singing, and praying, in a manner which does not violate [paragraphs] 1, 2, and 3 above . . . .

April 8, 1993, amended its prior order, concluding that Operation Rescue was engaging in actions that "impede and obstruct both staff and patients from entering the clinic" based on the following findings of fact:

A. That despite the injunction of September 30, 1992, there has been interference with ingress to the petitioners' facility known as the Aware Woman Clinic located on the northwest corner of U.S. Highway One and Dixie Way in the City of Melbourne, Brevard County, Florida. The interference to ingress has taken the form of persons on the paved portions of Dixie Way, some standing without any obvious relationship to others; some moving about, again without any obvious relationship to others; some holding signs, some not; some approaching, apparently trying to communicate with the occupants of motor vehicles moving on the paved surface; some marching in a circular picket line that traversed the entrance driveways to the two parking lots of the petitioners and the short section of sidewalk joining the two parking lots and then entering the paved portion of the north lane of Dixie Way and returning in the opposite direction. Other persons would be standing, kneeling and sitting on the unpaved shoulders of the public right-of-way. As vehicular traffic approached the area it would, in response to the congestion, slow down. If the destination of such traffic was either of the two parking lots of the petitioners, such traffic slowed even more, sometimes having to momentarily hesitate or stop until persons in the driveway moved out of the way.

B. The number of people on any one day would vary from a handful to a crowd of four hundred . . . . The frequency with which persons would appear at this location would range from once a week to three times a week with the largest gatherings usually on Saturdays.

C. Associated with such gatherings would be noise emanating from singing, chanting, whistling, loudspeakers . . . and occasional bullhorns . . . .

E. As traffic slowed on Dixie Way and began its turn into the clinic's driveway, the vehicle would be approached by persons designated by the respondents as sidewalk counselors attempting to get the attention of the vehicles' occupants to give them anti-abortion literature and to urge them not to use the clinic's services. Such so-called sidewalk counselors were assisted in accomplishing their approach to the vehicle by the hesitation or momentary stopping caused by the time needed for the picket line to open up before the vehicle could enter the parking lot.

The court noted that in addition to activities outside the Clinic, Operation Rescue had implemented a "blockade" of the Clinic's telephone system, jamming its lines with multiple simultaneous calls and making it impossible for Clinic staff to summon emergency medical aid:

2. . . . [R]epeated, nearly simultaneous, multiple telephone calls are made to the clinic, jamming its telephone lines. The jamming of the clinic's telephone system, makes it impossible for clinic staff to summon an ambulance to transfer any patient to the hospital should an emergency arise.

Further, Operation Rescue had approached the private residences of Clinic patients, employees, and staff, at times confronting employees' young children home alone while their parents worked:

G. On other occasions since the entry of the injunction on September 30, 1992, the respondent, Cadle, and others in concert with him approached the private residences or temporary lodging places of clinic employees. These approaches included not only direct communication with the occupants (sometimes the "home alone," minor children of the occupants), but also carrying signs, walking up and down on the sidewalk or street in front of the residence, shouting at passers-by, contacting (ringing doorbells of) neighbors, and providing literature identifying the clinic employee as a "baby killer."

H. On one occasion the respondent, Cadle, with others went to the vicinity of the motel where a staff physician was temporarily staying and demonstrated. While respondent, Cadle, remained outside just off the premises of the motel, others went upon the premises of the motel, some entering the motel lobby, yelling "child murderer" and "baby killer" . . .

. . . .

1. That license tag numbers of the clinic's patients are recorded by the respondents or persons in concert with them and then are traced through state records to obtain the home address of such persons who are subsequently contacted by the respondents.

And finally, Operation Rescue had threatened violence against Clinic patients, employees, and staff:

F. . . . On one occasion the communication to a clinic staff person took the form of an attempt to invoke the wrath of God by shouting, "I pray that God strikes you dead now!"

. . . .

J. On another occasion the doctor was followed as he left the clinic by a person associated with the respondents who communicated his anger to the doctor by pretending to shoot him from the adjoining vehicle. As a result of the foregoing demonstrations and activities, and after a physician similarly employed was killed by an antiabortionist at a clinic in North Florida, this doctor terminated his employment with the clinic.

. . . .

3. That patients and staff are sometimes followed in a stalking manner when they leave the clinic, giving such persons a feeling of great apprehension.

The doctor who ultimately terminated his employment with the Clinic as the result of Operation Rescue's tactics testified at the evidentiary hearing concerning the adverse medical impact of those tactics on Clinic patients:

I. . . As a result of patients having to run such a gauntlet, the patients manifested a higher level of anxiety and hypertension causing those patients to need a higher level of sedation to undergo the surgical procedures, thereby increasing the risk associated with such procedures. The doctor also testified that the noise of singing, chanting, shouting and yelling could be heard through the walls of the clinic and caused stress in the patients during surgical procedures and while recuperating in the recovery rooms. The doctor also testified that he observed some patients turn away from the crowd in the driveway to return at a later date. He testified that such delay in undergoing the procedures also increased the risk associated therewith.

Based on Operation Rescue's continued "interference with ingress to the [Clinic]," the trial court amended the general prohibitions of the permanent injunction to prohibit Operation Rescue from engaging in the following specific acts:

(1) At all times on all days, from entering the premises and property of the Aware Woman Center for Choice . . .

(2) At all times on all days, from blocking, impeding, inhibiting, or in any other manner obstructing or interfering with access to, ingress into and egress from any building or parking lot of the Clinic.

(3) At all times on all days, from congregating, picketing, patrolling, demonstrating or entering that portion of public right-of-way or private property within thirty-six (36) feet of the property line of the Clinic . . . . An exception to the 36 foot buffer zone is the area immediately adjacent to the Clinic on the east . . . . The respondents must remain at least five (5) feet from

the Clinic's east line . . . .

(4) During the hours of 7:30 a.m. through noon, on Mondays through Saturdays, during surgical procedures and recovery periods, from singing, chanting, whistling, shouting, yelling, use of bullhorns, auto horns, sound amplification equipment or other sounds or images observable to or within earshot of the patients inside the Clinic.

(5) At all times on all days, in an area within three-hundred (300) feet of the Clinic, from physically approaching any person seeking the services of the Clinic unless such person indicates a desire to communicate by approaching or by inquiring of the respondents . . . .

(6) At all times on all days, from approaching, congregating, picketing, patrolling, demonstrating or using bullhorns or other sound amplification equipment within three-hundred (300) feet of the residence of any of the petitioners' employees, staff, owners or agents, or blocking or attempting to block, barricade, or in any other manner, temporarily or otherwise, obstruct the entrances, exits or driveways of the residences of any of the petitioners' employees, staff, owners or agents. The respondents and those acting in concert with them are prohibited from inhibiting or impeding or attempting to impede, temporarily or otherwise, the free ingress or egress of persons to any street that provides the sole access to the streets on which those residences are located.

(7) At all times on ail days, from physically abusing, grabbing, intimidating, harassing, touching, pushing, shoving, crowding or assaulting persons entering or leaving, working at or using services at the petitioners' Clinic or trying to gain access to, or leave, any of the homes of owners, staff or patients of the Clinic.

(8) At all times on all days, from harassing, intimidating

or physically abusing, assaulting or threatening any present or former doctor, health care professional, or other staff member, employee or volunteer who assists in providing services at the petitioners' Clinic.

a. Law enforcement officers and Southern Bell Telephone Company are authorized, upon request of the Clinic owners to place a trap on the telephone lines of the Aware Woman Center in order to identify those persons engaged in a phone blockade and jamming of the Clinic's phone lines . . . .

Operation Rescue appealed the order granting the amended permanent injunction and the Fifth District Court of Appeal certified the trial court's order as passing on a matter of great public importance requiring immediate resolution by this Court.

II. LEGAL ISSUES

Operation Rescue challenges the propriety of only the amended permanent injunction, raising numerous issues under the United States Constitution: The amended injunction violates freedom of speech, freedom of association, equal protection, and the free exercise of religion.[5]

A. Standard of Review

In order for a permanent injunction to issue in a proceeding such as this, the petitioner must initially satisfy certain technical requirements:

> First, the plaintiff must demonstrate that the court's exercise of equity jurisdiction is proper. [In other words, the plaintiff must show that he or

[5] Although Operation Rescue notes in its brief that the right to free speech is also protected by the Florida Constitution, Operation Rescue makes no separate argument under the Florida charter.

> she has no adequate legal remedy; the threatened injury is real, not imagined; and no equitable defenses control.] Second, the plaintiff must actually succeed on the merits of [his or her] claims. Third, the plaintiff must show that the balance of equities tips in favor of injunctive relief.
>
> If an injunction should issue, the court has wide discretion in fashioning an appropriate remedy. But this discretion is constrained by precautionary considerations. The injunction that issues may not be drawn to enjoin all conceivable breaches of the law; it must instead be carefully tailored to remedy only the specific harms shown. It may be no broader than is necessary to restrain the unlawful conduct. The injunction, as drafted, should constitute "the least intrusive remedy that will still be effective."

Northeast Women's Center, Inc. v. McMonagle, 665 F. Supp. 1147, 1152-53 (E.D.Pa.1987) (citations omitted), *affirmed in part*, 868 F.2d 1342 (3d Cir.), *cert. denied*, 110 S.Ct. 261, 107 L.Ed.2d 210 (1989).

Where an injunction is issued and challenged, Florida's appellate courts possess express authority to review the order. Fla. R.App. P. 9.130(a)(3)(B). The scope of review, however, is limited. As a general rule, trial court orders are clothed with a presumption of correctness and will remain undisturbed unless the petitioning party can show reversible error. *Applegate v. Barnett Bank*, 377 So. 2d 1150 (Fla. 1979). To the extent it rests on factual matters, an order imposing a permanent injunction lies within the sound discretion of the trial court and will be affirmed absent a showing of abuse of discretion. See, e.g., *Bailey v. Christo*, 453 So. 2d 1134 (Fla. 1st DCA 1984), review denied, 461 So. 2d 113 (Fla. 1985). This is particularly true where the

order relies on live testimony or other evidence that the trial court is singularly well-suited to evaluate. Abuse of discretion, of course, is judged by the general "reasonableness" standard:

> In reviewing a true discretionary act, the appellate court must fully recognize the superior vantage point of the trial judge and should apply the "reasonableness" test to determine whether the trial judge abused his discretion. If reasonable men could differ as to the propriety of the action taken by the trial court, then the action is not unreasonable and there can be no finding of an abuse of discretion. The discretionary ruling of the trial judge should be disturbed only when his decision fails to satisfy this test of reasonableness.

Canakaris v. Canakaris, 382 So. 2d 1197, 1203 (Fla. 1980). To the extent it rests on purely legal matters, an order imposing an injunction is subject to full, or de novo, review on appeal. In the present case, Operation Rescue does not seriously question the technical validity of the amended injunction or the factual findings on which it is based. Our own review of the record shows that the order meets the "reasonableness" test for technical validity and that competent, substantial evidence supports the court's factual findings. Accordingly, we take as true the trial court's facts for purposes of evaluating Operation Rescue's constitutional claims.

B. Free Speech

Operation Rescue claims that the amended injunction violates the Free Speech Clause of the First Amendment of the United States Constitution because it completely bans religious speech in a traditional public forum, is not the least restrictive means of achieving the government interest, does not leave open ample alternative means of communication, and constitutes an impermissible prior restraint on free speech.

The present amended injunction undeniably operates at the core of the First Amendment because it regulates picketing and other activities on an issue of public concern and courts "have traditionally subjected [such] restrictions on public issue [expression] to careful scrutiny." *Frisby v. Schultz*, 487 U.S. 474, 479, 108 S.Ct. 2495, 101 L.Ed.2d 420 (1988). Nonetheless, "[e]ven protected speech is not equally permissible in all places and at all times. Nothing in the Constitution requires the Government freely to grant access to all who wish to exercise their right to free speech on every type of Government property without regard to the nature of the property or to the disruption that might be caused by the speaker's activities." *Cornelius v. NAACP Legal Defense and Educational Fund, Inc.*, 473 U.S. 788, 799-800, 105 S.Ct. 3439, 87 L.Ed.2d 567 (1985).

1. Traditional public forum

To determine whether or to what extent limits may be placed on protected speech, the United States Supreme Court has generally focused on the place, or "forum," where the citizen seeks to speak. *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 103 S.Ct. 948, 74 L.Ed.2d 794 (1983). The federal Court has identified three types of First Amendment fora, "the traditional public forum, the public forum created by government designation, and the nonpublic forum," and has tailored an analysis for each. *Cornelius*, 473 U.S. at 802.

The forum at issue in the present case consists of public streets, sidewalks, and rights-of-way, which--as the present parties agree--constitute a traditional public forum. See *Frisby*, 487 U.S. at 480. The relevant inquiry in such a case is multi-step and depends initially on whether the restriction is content-based or content-neutral:

> In places which by long tradition or by government fiat have been devoted to assembly and debate, the rights of the State to limit

expressive activity are sharply circumscribed. At one end of the spectrum are streets and parks which "have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." In these quintessential public forums, the government may not prohibit all communicative activity. For the State to enforce a content-based exclusion it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end. The State may also enforce regulations of time, place and manner of expression which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.

Perry, 460 U.S. at 45 (quoting *Hague v. Committee for Indus. Org.*, 307 U.S. 496, 515, 59 S.Ct. 954, 83 L.Ed. 1423 (1939).

2. Content-neutral

Operation Rescue claims that the time, place, and manner restrictions at issue here are content-based and thus subject to the more stringent test noted above in Perry. We disagree. The restrictions regulate when, where, and how Operation Rescue may speak, not what it may say. The restrictions make no mention whatsoever of abortion or any other political or social issue; they address only the volume, timing, location, and violent or harassing nature of Operation Rescue's expressive activity.

> In fact, the injunction could apply equally to protests which supported abortion as well as to protests which opposed abortion, or indeed, to protests supporting or opposing any other cause.

> It is true that this injunction applies only to [these particular abortion opponents], but that is because it is only those persons who the Center has proved have created and are continuing to create a threat of violence and intimidation.

Northeast Women's Center, Inc. v. McMonagle, 939 F.2d 57, 63 (3rd Cir. 1991). Because the restrictions are content-neutral, we proceed to decide whether they are "narrowly-tailored to serve a significant government interest, and leave open ample alternative channels of communication." *Perry*, 460 U.S. at 45.

3. Government interests

Operation Rescue claims that no significant government interest is implicated. We disagree. Numerous government interests, all of which rise to the level of "significant" or higher, are apparent. Our state has a strong interest in protecting the constitutional rights, both state and federal, express and implied, of all Florida's citizens, including its women. A woman's freedom to seek lawful medical or counseling services in connection with her pregnancy constitutes a clear personal right under both our state and federal constitutions. See *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973); *In re T.W.*, 551 So.2d 1186, 1193 (Fla. 1989). Our state also has strong interests in ensuring the public safety and order, in promoting the free flow of traffic on public streets and sidewalks, and in protecting property rights of all Florida's citizens.

The United States Supreme Court delineated an additional government interest in *Frisby v. Schultz*, 487 U.S. 474, 108 S.Ct. 2495, 101 L.Ed.2d 420 (1988), wherein the Court addressed the issue of picketers demonstrating outside the home of an abortion clinic doctor in violation of a city ordinance banning all residential picketing. The Court, in upholding the ordinance, noted that "the protection of residential privacy" constitutes "a significant government interest" and that "[o]ne important aspect of residential

privacy is protection of the unwilling listener." *Id.* at 484.

> Although in many locations, we expect individuals simply to avoid speech they do not want to hear, the home is different. "That we are often captives outside the sanctuary of the home and subject to objectionable speech . . . does not mean we must be captives everywhere." Instead, a special benefit of the privacy all citizens enjoy within their own walls, which the State may legislate to protect, is an ability to avoid intrusions. Thus, we have repeatedly held that individuals are not required to welcome unwanted speech into their own homes and that the government may protect this freedom.

Id. at 484-85 (citations omitted) (quoting *Rowan v. United States Post Office Dep't*, 397 U.S. 728, 738, 90 S.Ct. 1484, 25 L.Ed.2d 736 (1970)). We conclude that the reasoning underlying this government interest in residential privacy applies even more convincingly to the state interest in ensuring medical privacy. Florida citizens are entitled to both unimpeded access to licensed medical facilities and freedom from unwanted confrontations and communications when undergoing lawful medical treatment, particularly where the effect of such confrontations is to place the patient's health and safety in jeopardy.

4. Narrowly tailored

Operation Rescue contends that the restrictions are not narrowly tailored, but rather operate as a complete ban on all religious and pro-life picketing outside the Clinic and homes of Clinic workers. We disagree. In sum, the amended injunction bans Operation Rescue from entering or blocking access to the Clinic, demonstrating within five feet of Clinic property on one side of the Clinic and thirty-six feet on the other three sides, making loud noises during surgery hours, approaching Clinic

patients within three hundred feet of Clinic property unless invited, demonstrating within three hundred feet of the homes of Clinic workers, or engaging in violent or threatening acts against Clinic workers or patients. The trial court found as a factual matter that each of these restrictions is necessary to counteract specific abuses Operation Rescue fomented after entry of the permanent injunction nearly six months earlier. As noted above, competent, substantial evidence supports all the trial court's factual findings, including its determination that Operation Rescue engaged in impermissible activities, and Operation Rescue does not now contend otherwise.

The type of focused picketing banned from the buffer zone around the Clinic and residences differs fundamentally from the type of generally disseminated communication that cannot be completely banned in public places, such as handbilling and solicitation. Here, the picketing is directed at particular Clinic workers and patients, not the public at large. The United States Supreme Court has noted the difference between targeted and general picketing and described the invidious effect of this type of targeted picketing by those opposed to abortion:

> The type of picketers [i.e., abortion opponents outside a doctor's home] banned by the [restriction] generally do not seek to disseminate a message to the general public, but to intrude upon the targeted resident, and to do so in an especially offensive way. Moreover, even if some such picketers have a broader communicative purpose, their activity nonetheless inherently and offensively intrudes on residential privacy. The devastating effect of targeted picketing on the quiet enjoyment of the home is beyond doubt . . . .
>
> . . . .
>
> The First Amendment permits the government to prohibit offensive speech as intrusive when the

> "captive" audience cannot avoid the objectionable speech. The target of the focused picketing banned by the [restriction] is just such a "captive." The resident is figuratively, and perhaps literally, trapped within the home, and because of the unique and subtle impact of such picketing is left with no ready means of avoiding the unwanted speech. Thus, the "evil" of targeted residential picketing, "the very presence of an unwelcome visitor at the home, is created by the medium of expression itself." Accordingly, the [restriction's] complete ban of that particular medium of expression is narrowly tailored.

Frisby, 487 U.S. at 486-88 (citations omitted). The above reasoning applies with even greater force where the object of targeted picketing is the medical patient seeking treatment, rather than the home-dweller. While targeted picketing of the home threatens the psychological well-being of the "captive" resident, targeted picketing of the hospital or clinic threatens not only the psychological but the physical well-being of the patient held "captive" by medical circumstance. This is amply demonstrated by the trial court's findings in the present case.

We note that while the trial court might perhaps have achieved its goal through use of a slightly narrower buffer zone around the Clinic and workers' residences, or perhaps by allowing a solitary picketer within the buffer zone as a symbolic gesture,[6] this Court will not sit as trier-of-fact and make incremental changes in the trial court's order, particularly where the restrictions were necessitated by clear abuse. In short, we "decline to entertain quibbling over a few feet" or over purely symbolic matters. *Portland Feminist Women's Health Center v. Advocates*

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[6] But see *Frisby v. Schultz*, 487 U.S. 474, 487, 108 S.Ct. 2495, 101 L.Ed.2d 420 (1988) ("But the actual size of the group is irrelevant; even a solitary picket can invade residential privacy.")

for Life, Inc., 859 P.2d 681, 686 (9th Cir. 1988). The amendments accordingly are sufficiently narrowly tailored to protect significant government interests.

5. Alternative means of communication

As its last point under the *Perry* standard, Operation Rescue claims that the restrictions do not leave open ample alternative means of communication. We point out, however, that Operation Rescue may at all times engage in expressive activity in the vicinity of the Clinic. In fact, Operation Rescue is entirely free to do the following at any time on any day: place an unrestricted number of picketers along the south edge of Dixie Way and both the east and west edge of U.S. 1; engage in singing, chanting, and whistling, as long as it cannot be heard inside the Clinic during the designated times; engage in "sidewalk counseling" of any Clinic patient who invites contact outside the five-foot and thirty-six-foot buffer zones; and picket in the neighborhoods of Clinic workers outside the three-hundred-foot buffer zone. Dixie Way is only twenty-one feet wide in the area of the Clinic and for all practical purposes Operation Rescue will be able to convey its message just as effectively from the south side of the road as the north. In fact, on the south side, its picketers will be in closer proximity to all eastbound traffic and will thus be better-positioned to deliver their message to those drivers and passengers. The only thing Operation Rescue will be unable to do from the south side that it could otherwise do from the north is block ingress to and egress from the Clinic. The amended injunction thus leaves open ample alternative means of communication for those who object to the Clinic's activities.

6. Prior restraint

As its last point under the Free Speech Clause, Operation Rescue claims that the injunction operates as an unconstitutional prior restraint on protected speech. The doctrine of prior restraint applies to content-based restrictions on speech prior to its

occurrence. See *Northeast Women's Center, Inc. v. McMonagle*, 939 F.2d 57 (3rd Cir. 1991); *Planned Parenthood League of Massachusetts, Inc. v. Operation Rescue*, 550 N.E. 2d 1361 (Mass. 1990). As explained above, however, the present injunction is content-neutral.

C. Vagueness and Overbreadth

Operation Rescue claims that the following restrictions are both unconstitutionally vague and overbroad: the ban on "sounds or images observable to or within earshot of the patients inside the Clinic," the ban on "physically approaching any person seeking the services of the Clinic" within three hundred feet of the Clinic, and the ban on demonstrating within three hundred feet of workers' residences.

The United States Supreme Court has explained the doctrine of "vagueness":

> It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, but related, where a vague

> statute "abut[s] upon sensitive areas of basic First Amendment freedoms," it "operates to inhibit the exercise of those freedoms." Uncertain meanings inevitably lead citizens to " 'steer far wider of the unlawful zone'. . . than if the boundaries of the forbidden areas were clearly marked."

Grayned v. City of Rockford, 408 U.S. 104, 108-09, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972) (footnotes omitted). In sum, a government restriction is vague if it "either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." *Connally v. General Construction Co.*, 269 U.S. 385, 391, 46 S.Ct. 126, 70 L.Ed. 322 (1926).

We conclude that the ban on "sounds or images observable to or within earshot of the patients inside the Clinic" is sufficiently specific to put Operation Rescue on notice that loud noises may not be made and signs depicting patients' names or other images may not be displayed from ladders above the Clinic fence in such a manner that they would be observable to patients within the Clinic during surgery and recovery periods. See *Northeast Women's Center, Inc. v. McMonagle*, 939 F.2d 57, 72 (3rd Cir. 1991) (injunction containing identical ban on "sounds or images observable to or within earshot of patients inside the Center" upheld). Similarly, the restrictions concerning "physically approaching" Clinic patients and demonstrating within three hundred feet of workers' homes are constitutionally sound. Each restriction was fashioned to combat a specific abuse and each provides reasonable notice that those particular abuses will no longer be tolerated. "Condemned to the use of words, we can never expect mathematical certainty from our language. The words of the [ban] are marked by "flexibility and reasonable breadth, rather than meticulous specificity," [and] we think it is clear what the [ban] as a whole prohibits." *Grayned*, 408 U.S. at 110 (citations and footnotes omitted). "We thus are unable to disagree with the [trial] court's conclusion that the terms of the

[ban] are not so indefinite that men of common intelligence must necessarily guess at its meaning and differ as to its application." *Medlin v. Palmer*, 874 F.2d 1085, 1091 (5th Cir. 1989).

As to overbreadth, the United States Supreme Court has noted that "[a] clear and precise enactment may nevertheless be 'overbroad' if in its reach it prohibits constitutionally protected conduct. . . . The crucial question, then, is whether the [ban] sweeps within its prohibitions what may not be punished under the First ... Amendment[ ]." 408 U.S. at 114-15. Operation Rescue claims that the above restrictions are overbroad in that they ban protected activities and reach individuals and groups not responsible for disruptive conduct. We have discussed the first concern already and have concluded that the amended injunction is narrowly tailored to achieve its purpose. As to the second, we note that the injunction tracks the language of Florida Rule of Civil Procedure 1.160(c), which provides that "[e]very injunction shall . . . be binding on the parties to the action, their officers, agents, servants, employees, and attorneys and on those persons in active concert or participation with them who receive actual notice of the injunction." Given this limitation on the injunction's reach, we find no danger that the ban will be unfairly enforced against persons who have no notice or knowledge of the injunction's existence. See *Portland Feminist Women's Health Center v. Advocates for Life, Inc.*, 859 F.2d 681 (9th Cir. 1988).[7]

III. CONCLUSION

Richard Grayned was convicted for participating in a demonstration in 1969 outside West Senior High School in Rockford, Illinois, protesting the school's lack of African-American programs. The city ordinance under which he was convicted forbade any "noise or diversion which disturbs or tends to disturb the peace or good order of such school session or

[7] We find the remainder of Operation Rescue's constitutional claims to be without merit.

class thereof." *Grayned v. City of Rockford*, 408 U.S. 104, 107-08, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972). In a key case on First Amendment rights, the United States Supreme Court upheld the conviction and ordinance, with Justice Marshall writing for the Court:

> The nature of a place, "the pattern of its normal activities, dictate the kinds of regulations of time, place, and manner that are reasonable." Although a silent vigil may not unduly interfere with a public library, making a speech in the reading room almost certainly would. That same speech should be perfectly appropriate in a park. The crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time.

Id. at 116 (citation and footnote omitted). Justice Marshall went on to note that "schools could hardly tolerate boisterous demonstrators who drown out classroom conversation, make studying impossible, block entrances, or incite children to leave the schoolhouse." *Id.* at 119. In other words, the First Amendment must yield when protected speech substantially interferes with the normal functioning of a public or private place.

This rule is particularly apt in the present case, where demonstrators' tactics have impaired the functioning not of a school but a licensed medical facility and have placed in jeopardy the health, safety, and rights of Florida women. Operation Rescue has formally stipulated that its program is "directed towards closing down abortion clinics." This philosophy and the organization's past tactics are clearly "incompatible with the normal activity of [this] particular place." *Grayned*, 408 U.S. at

116.[8]

We hold the restrictions contained in the amended permanent injunction constitutional in light of the medical services provided at the Clinic and Operation Rescue's past conduct. While the First Amendment confers on each citizen a powerful right to express oneself, it gives the picketer no boon to jeopardize the health, safety, and rights of others. No citizen has a right to insert a foot in the hospital or clinic door and insist on being heard--while purposefully blocking the door to those in genuine need of medical services. No picketer can force speech into the captive ear of the unwilling and disabled.

Our holding is consistent with the vast weight of both federal and state caselaw, wherein courts have upheld virtually all the present restrictions under similar circumstances.[9]

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[8] Operation Rescue's reliance on *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 102 S.Ct. 3409, 73 L. Ed. 2d 1215 (1982), to support its Free Speech claims is misplaced. There, the United States Supreme Court ruled that the First Amendment bars Mississippi courts from imposing damages liability in favor of white merchants against individuals and civil rights organizations for lost earnings stemming from a black boycott of white businesses during the 1960's. Although state courts had originally granted injunctive relief to the merchants, the injunction issue became moot when the boycott was voluntarily lifted and was not addressed at all by the federal Court. The propriety of the injunction in the present case, on the other hand, is the sole issue before this Court--no party even claims that the Health Center is entitled to damages for Operation Rescue's actions.

[9] See, e.g., *Frisby v. Schultz*, 487 U.S. 474, 108 S.Ct. 2495, 101 L. Ed. 2d 420 (1988) (ordinance imposing blanket ban on targeted residential picketing constitutional where abortion opponents had demonstrated outside doctor's home); *Northeast Women's Center, Inc. v. McMonagle*, 939 F.2d 57 (3rd Cir. 1991) (injunction containing language virtually identical to that in the present case held constitutional where read as creating 500 foot buffer zone around clinic and workers' homes); *Medlin v. Palmer*, 874 F.2d 1085 (5th Cir. 1989) (ordinance banning use of bullhorns and loudspeakers within 150 feet of medical clinic upheld against challenge by abortion opponents); *Portland Feminist Women's Health Center v. Advocates for Life, Inc.*, 859 F.2d 681 (9th Cir. 1988)

Based on the foregoing, we approve the trial court's order imposing the amended permanent injunction. A full copy of the amended injunction is appended to this opinion.[10]

It is so ordered.

BARKETT, C.J., and OVERTON, McDONALD, SHAW, GRIMES, KOGAN and HARDING, JJ., concur.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING, AND IF FILED, DETERMINED.

(injunction limiting picketing outside abortion clinic upheld when read as banning noise that "substantially interferes with the provision of medical services within the Clinic, including counseling"); *Hirsh v. City of Atlanta*, 401 S.E.2d 530 (Ga.) (injunction limiting demonstrations outside abortion clinic upheld), cert. denied, 112 S.Ct. 75, 116 L. Ed. 2d 49 (1991); *Planned Parenthood v. Operation Rescue*, 550 N.E.2d 1361 (Mass. 1990) (injunction limiting demonstrations outside abortion clinic upheld); *Bering v. Share*, 721 P.2d 918 (Wash. 1986) (injunction limiting demonstrations outside abortion clinic upheld), cert. dismissed, 479 U.S. 1050, 107 S.Ct. 940, 93 L. Ed. 2d 990 (1987).

[10] We recognize that a panel of the United States Court of Appeals for the Eleventh Circuit has recently ruled that the federal district court erred in denying an abortion opponent's request for relief from the above injunction. See *Cheffer v. McGregor*, No. 93-2407 (11th Cir. Oct. 20, 1993).

APPENDIX B

IN THE CIRCUIT COURT
OF THE EIGHTEENTH JUDICIAL CIRCUIT
IN AND FOR SEMINOLE COUNTY, FLORIDA

CASE NO.: 91-2811-CA-16-K

WOMEN'S HEALTH CENTER, INC.,
AWARE WOMAN CENTER FOR
CHOICE, INC., ET AL.,
Petitioners,

vs.

OPERATION RESCUE, OPERATION
RESCUE AMERICA, OPERATION
GOLIATH, ED MARTIN, BRUCE CADLE,
SHIRLEY HOBBS, JUDY MADSEN, ET AL.,
Respondents.

April 8, 1993

AMENDED PERMANENT INJUNCTION

THIS CAUSE came before the court for hearing on the motion of petitioners for sanctions and modification of the permanent injunction entered by this court, (The Honorable Wallace H. Hall), dated September 30, 1992, and the court having taken three days of testimony and having carefully considered the evidence and the legal arguments makes the following findings:

A. That despite the injunction of September 30, 1992,

there has been interference with ingress to the petitioners' facility known as the Aware Woman Clinic located on the northwest corner of U.S. Highway One and Dixie Way in the City of Melbourne, Brevard County, Florida. The interference to ingress has taken the form of persons on the paved portions of Dixie Way, some standing without any obvious relationship to others; some moving about, again without any obvious relationship to others; some holding signs, some not; some approaching, apparently trying to communicate with the occupants of motor vehicles moving on the paved surface; some marching in a circular picket line that traversed the entrance driveways to the two parking lots of the petitioners and the short section of sidewalk joining the two parking lots and then entering the paved portion of the north lane of Dixie Way and returning in the opposite direction. (See drawing attached.) Other persons would be standing, kneeling and sitting on the unpaved shoulders of the public right-of-way. As vehicular traffic approached the area it would, in response to the congestion, slow down. If the destination of such traffic was either of the two parking lots of the petitioners, such traffic slowed even more, sometimes having to momentarily hesitate or stop until persons in the driveway moved out of the way.

B. The number of people on any one day would vary from a handful to a crowd of four hundred. The composition of the crowd would include some of the named respondents in this cause; some persons who were loosely associated with the respondents' organizations, Operation Rescue and Operation Goliath; some who were present in support of the clinic (pro-choice); some law enforcement officers engaging in crowd and traffic control (from five officers on light days to as many as fifty officers on other days); and some representatives of the print and television media. The frequency with which persons would appear at this location would range from once a week to three times a week with the largest gatherings usually on Saturdays.

C. Associated with such gatherings would be noise emanating from singing, chanting, whistling, loudspeakers on the

exterior of the clinic broadcasting music, individual portable radios (boom boxes), and occasional bullhorns. Individuals of the partisan groups would shout and yell at each other, frequently approaching so closely as to be in each other's face trying to out-sound the other, occasionally using boom boxes at full volume as an assist.

D. The Melbourne Police Department officers on the scene on some occasions erected temporary barricades (saw horse type) in an effort to put some distance between the partisan groups. The respondents and those aligned with them, remained primarily in the public right of way (paved and unpaved). The pro choice people would be on the edge of the clinic's lawn and parking lot (private property) but occasionally attempting to share the sidewalk with the opposition. On at least one occasion in order to give more room for people, the police barricaded the north lane of Dixie Way so that two-way vehicular traffic was confined to the single south lane.

E. As traffic slowed on Dixie Way and began its turn into the clinic's driveway, the vehicle would be approached by persons designated by the respondents as sidewalk counselors attempting to get the attention of the vehicles' occupants to give them anti-abortion literature and to urge them not to use the clinic's services. Such so-called sidewalk counselors were assisted in accomplishing their approach to the vehicle by the hesitation or momentary stopping caused by the time needed for the picket line to open up before the vehicle could enter the parking lot.

F. The clinic has fences on its west and north side, and persons would occasionally place a ladder on the outside of the fence and position themselves at an elevation above the fence and attempt to communicate by shouting at persons (staff and patients) entering the clinic. On one occasion the communication to a clinic staff person took the form of an attempt to invoke the wrath of God by shouting, "I pray that God strikes you dead now!"

G. On other occasions since the entry of the injunction on September 30, 1992, the respondent, Cadle, and others in concert with him approached the private residences or temporary lodging places of clinic employees. These approaches included not only direct communication with the occupants (sometimes the "home alone", minor children of the occupants), but also carrying signs, walking up and down on the sidewalk or street in front of the residence, shouting at passers-by, contacting (ringing doorbells of) neighbors, and providing literature identifying the clinic employee as a "baby killer."

H. On one occasion the respondent, Cadle, with others went to the vicinity of the motel where a staff physician was temporarily staying and demonstrated. While respondent, Cadle, remained outside just off the premises of the motel, others went upon the premises of the motel, some entering the motel lobby, yelling "child murderer" and "baby killer." The doctor testified that as a result of such activity his departure for the clinic was delayed by one-half hour.

I. The same staff physician testified that on one occasion while he was attempting to enter the parking lot of the clinic, he had to stop his vehicle and remained stopped while respondent, Cadle, and others took their time to get out of the way and while doing so were yelling and screaming at the doctor, "Baby killer" - "We don't want you here in Melbourne." This physician also testified that he witnessed the demonstrators running along side of and in front of patients' vehicles, pushing pamphlets in car windows to persons who had not indicated any interest in such literature. As a result of patients having to run such a gauntlet, the patients manifested a higher level of anxiety and hypertension causing those patients to need a higher level of sedation to undergo the surgical procedures, thereby increasing the risk associated with such procedures. The doctor also testified that the noise of singing, chanting, shouting and yelling could be heard through the walls of the clinic and caused stress in the patients during surgical procedures and while recuperating in the recovery rooms. The

doctor also testified that he observed some patients turn away from the crowd in the driveway to return at a later date. He testified that such delay in undergoing the procedures also increased the risk associated therewith.

J. On another occasion the doctor was followed as he left the clinic by a person associated with the respondents who communicated his anger to the doctor by pretending to shoot him from the adjoining vehicle. As a result of the foregoing demonstrations and activities, and after a physician similarly employed was killed by an antiabortionist at a clinic in North Florida, this doctor terminated his employment with the clinic.

K. Further the testimony of witnesses shows:

1. That license tag numbers of the clinics patients are recorded by the respondents or persons in concert with them and then are traced through state records to obtain the home address of such persons who are subsequently contacted by the respondents.

2. That on occasion repeated, nearly simultaneous, multiple telephone calls are made to the clinic, jamming its telephone lines. The jamming of the clinic's telephone system, makes it impossible for clinic staff to summon an ambulance to transfer any patient to the hospital should an emergency arise.

3. That patients and staff are sometimes followed in a stalking manner when they leave the clinic, giving such persons a feeling of great apprehension.

Conclusions

A. That the actions of the respondents and those in concert with them in the street and driveway approaches to the clinic of the plaintiffs continue to impede and obstruct both staff and patients from entering the clinic. The paved surfaces of the public right-of-

way must be kept open for the free flow of vehicular traffic.

B. That the noise associated with the demonstrations impermissibly interferes with the operation of the clinic and the well-being of its patients and should be limited and restrained.

C. That the actions of the respondents and those acting in concert with them directed at the residences (including the temporary motel residence) of the clinic staff is impermissible conduct and should be limited and restrained. A person's home is his last place of refuge and his right of privacy therein should be protected. A place of business, not involved in the controversy of others, should not be subjected to demonstrations that interfere with business customers.

D. That the actions of the respondents and those acting in concert with them in respect to interfering with the telephone service of the clinic is impermissible and should be restrained.

E. That the uninvited contacts, shadowing and stalking by the respondents and those acting in concert with them of the clinic staff and patients are impermissible conduct and should be restrained.

F. That the rights of the respondents to demonstrate, speak and make known their views should be recognized and protected.

It is, therefore

ORDERED AND ADJUDGED that the respondents, Operation Rescue, Operation Rescue America, Operation Goliath, their officers, agents, members, employees and servants, and Ed Martin, Bruce Cadle, Pat Mahoney, Randall Terry, Judy Madsen, and Shirley Hobbs, and all persons acting in concert or participation with them, or on their behalf, with notice in any manner or by means of this order (hereinafter referred to generally as respondents) are permanently enjoined from engaging in the

following:

(1) At all times on all days, from entering the premises and property of the Aware Woman Center for Choice, Inc. Clinic (hereinafter Clinic) located at the northwest corner of U.S. Highway One and Dixie Way in Melbourne, Brevard County, Florida.

(2) At all times on all days, from blocking, impeding, inhibiting, or in any other manner obstructing or interfering with access to, ingress into and egress from any building or parking lot of the Clinic.

(3) At all times on all days, from congregating, picketing, patrolling, demonstrating or entering that portion of public right--of-way or private property within thirty-six (36) feet of the property line of the Clinic. The 36 foot buffer on the south side of the Clinic is demarcated by the south edge of paved surface of Dixie Way. It is the intent of the court that the respondents may use, subject to other restrictions contained herein, the unpaved portion (the shoulder) on the south side of Dixie Way. A drawing is attached hereto showing the various areas and lines. An exception to the 36 foot buffer zone is the area immediately adjacent to the Clinic on the east, lying in the right-of-way of U.S. Highway One. This area is composed of a flat shoulder area rising up an embankment to the easterly property line of the Clinic. The respondents may enter the shoulder area of U.S. Highway One, but may not go up the embankment and must remain at least five (5) feet from the Clinic's east line. Another exception to the 36 foot buffer zone relates to the record title owners of the property to the north and west of the Clinic. The prohibition against entry into the 36 foot buffer zone does not apply to such persons and their invitees. The other prohibitions contained herein do apply, if such owners and their invitees are acting in concert with the respondents. Another exception to the 36 foot buffer zone relates to the area of the pedestrian crosswalk near the area where Dixie Way enters into U.S. Highway One. The testimony before the

Court revealed that such crosswalk is not presently marked by customary white lines. It is the request of this court, in order to assist the parties in complying with this injunction, that the City of Melbourne establish a crosswalk area at the eastern end of Dixie Way in customary manner by applying painted lines on the surface of the pavement. Until such lines are applied, the respondents may use an area of the paved surface of Dixie Way as a crosswalk, but must confine their use of such area to a strip of pavement eight (8) feet wide, running directly from the south edge of Dixie Way to the north edge thereof, the westerly line of such strip being coextensive with the western right-of-way line of U.S. Highway One. (See drawing attached.) After painted lines are applied, the respondents must not enter any portion of the paved surface of Dixie Way outside of the crosswalk within the 36 foot buffer zone. The respondents use of the crosswalk must be limited to the prompt crossing of the street. The crosswalk may not be used as an area of picketing, congregating or demonstrating. The respondents use of the crosswalk must not inhibit or impede the free flow of traffic on Dixie Way, and no stopping or hesitation in the crosswalk shall be allowed.

(4) During the hours of 7:30.a.m. through noon, on Mondays through Saturdays, during surgical procedures and recovery periods, from singing, chanting, whistling, shouting, yelling, use of bullhorns, auto horns, sound amplification equipment or other sounds or images observable to or within earshot of the patients inside the Clinic.

(5) At all times on all days, in an area within three-hundred (300) feet of the Clinic, from physically approaching any person seeking the services of the Clinic unless such person indicates a desire to communicate by approaching or by inquiring of the respondents. In the event of such invitation, the respondents may engage in communications consisting of conversation of a non-threatening nature and by the delivery of literature within the three-hundred (300) foot area but in no event within the 36 foot buffer zone. Should any individual decline such communication,

otherwise known as "sidewalk counseling", that person shall have the absolute right to leave or walk away and the respondents shall not accompany such person, encircle, surround, harass, threaten or physically or verbally abuse those individuals who choose not to communicate with them.

(6) At all times on all days, from approaching, congregating, picketing, patrolling, demonstrating or using bullhorns or other sound amplification equipment within three-hundred (300) feet of the residence of any of the petitioners' employees, staff, owners or agents, or blocking or attempting to block, barricade, or in any other manner, temporarily or otherwise, obstruct the entrances, exits or driveways of the residences of any of the petitioners' employees, staff, owners or agents. The respondents and those acting in concert with them are prohibited from inhibiting or impeding or attempting to impede, temporarily or otherwise, the free ingress or egress of persons to any street that provides the sole access to the street on which those residences are located.

(7) At all times on all days, from physically abusing, grabbing, intimidating, harassing, touching, pushing, shoving, crowding or assaulting persons entering or leaving, working at or using services at the petitioners' Clinic or trying to gain access to, or leave, any of the homes of owners, staff or patients of the Clinic (unless permitted by "invited contact" as defined on page 10 of this order).

(8) At all times on all days, from harassing, intimidating or physically abusing, assaulting or threatening any present or former doctor, health care professional, or other staff member, employee or volunteer who assists in providing services at the petitioners' Clinic.

(9) At all times on all days, from encouraging, inciting, or securing other persons to commit any of the prohibited acts listed herein.

ORDERED AND ADJUDGED that nothing herein shall restrict duly constituted law enforcement authorities from providing traffic control and regulation and measures necessary to insure public safety and the protection of both public and private property.

ORDERED AND ADJUDGED that any City of Melbourne police officer or other person authorized to serve process may serve a copy of this order on any individual who may not have otherwise received notice of the order. Such officer may read the operative prohibitory language of this order to any individual who is without notice of this order, and such service or oral notice shall subject the person so served or noticed to the sanctions provided for herein for failure to comply herewith. If the authorities of the City of Melbourne determine that it would assist them in enforcing this order to erect in the public right-of-way a notice that the use of the area specified herein as a buffer zone is subject to court order, they are authorized to do so. Such signs may contain the following language or words of similar import: "WARNING. Demonstrations and picketing in this area are limited by court order. Violators of this court order are subject to arrest. See Amended Permanent Injunction dated April 8, 1993, filed in Case No. 91-2811-CA-16-K, Circuit Court, 18th Judicial Circuit, Seminole County, FL. Copies of the Amended Permanent Injunction are posted at Brevard County Branch Courthouse, 50 S. Neiman Ave., Melbourne, FL; Sarno Complex, 1515 Sarno Road, Melbourne, FL; and Melbourne City Hall, 900 E. Strawbridge Ave., Melbourne, FL."

ORDERED AND ADJUDGED that, in order to provide for the protection of the owners, staff and patients of the Clinic and to prevent the further disruption of the operation of the Clinic, the court hereby enters the following additional orders:

a. Law enforcement officers and Southern Bell Telephone Company are authorized, upon request of the Clinic owners to place a trap on the telephone lines of the Aware Woman Center in

order to identify those persons engaged in a phone blockade and jamming of the Clinic's phone lines.

b. Law enforcement authorities, pursuant to the protective provisions of the court's order, are authorized to arrest those persons who appear to be in willful and intentional disobedience of this injunction. Upon such arrest the person so arrested shall be admitted to bail upon the posting of a $500 cash or surety bond, which bond will be returnable before the undersigned judge at his chambers, Room N327, Seminole County Courthouse, 301 N. Park Avenue, Sanford, FL at 8:30 a.m. on the seventh (7th) day after arrest exclusive of weekends and holidays. Any county or circuit judge in Brevard County is authorized to modify, upward or downward, the dollar amount and the return date of such bond upon good cause being shown. In the event of arrest and no bond being posted, the person arrested shall be promptly transferred to the Seminole County jail and the undersigned judge shall be immediately notified by the arresting officer and Seminole County jailer of such confinement. Such arrested persons shall be brought before the undersigned judge not later than 8:30 a.m. of the day following his confinement in the Seminole County jail.

ORDERED AND ADJUDGED that at all times on all days, respondents shall have the right to congregate, demonstrate and freely express themselves outside the Clinic buffer zone subject to the noise limitations on the days of surgical procedures set out in paragraph 4 of this order and subject also to all other provisions of this order and any other restraining orders and injunctions that may have been issued by other courts.

ORDERED AND ADJUDGED that at all times on all days, respondents will have the right of invited contact with persons protected hereby so long as it is outside of the Clinic buffer zone. "Invited contact" is defined as conduct by the person sought to be contacted which affirmatively indicates a desire to engage in conversation or to receive literature. Such affirmative indication may include where the person sought to be contacted

physically approaches the respondent, or where such person extends his or her hand to receive literature, or speaks words indicating a positive interest in what the respondent is saying. Such invited contact by a person protected hereby as it relates to a contact at such persons residence is limited to conduct transmitted by the resident to a respondent at a distance from and at a time prior to the contact and shall not include the uninvited ringing of a doorbell or knock on a door. Any invited contact may be canceled by such person by words spoken that indicate a desire to end the contact, such as "stop", "withdraw", "back off", "get away", "leave me alone" or words or actions of similar import. Where such desire to end the contact is made known to a respondent, he/she must immediately terminate the contact and leave the presence of the person protected hereby.

ORDERED AND ADJUDGED that the permanent injunction of this court issued September 30, 1992, shall remain in full force and effect as to all persons and entities and places mentioned therein except as hereby modified.

Attached hereto and made a part hereof is a drawing which shows the Clinic buffer zone referred to in this order.

DONE AND ORDERED in Sanford, Seminole County, Florida this 8th day of April, 1993.

/s/ Robert B. McGregor
ROBERT B. MCGREGOR, Circuit Judge

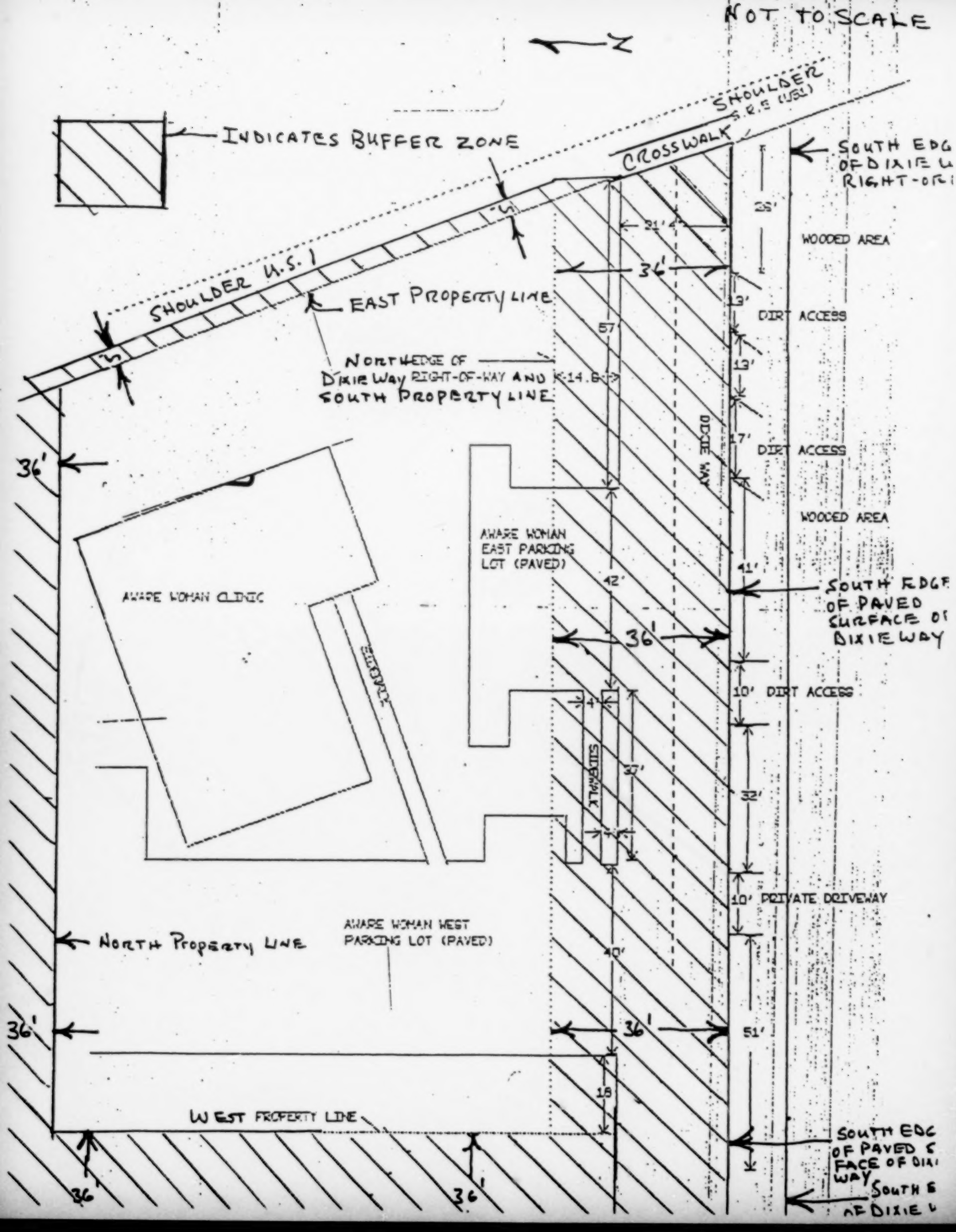
Copies furnished to:

Talbot D'Alemberte, 215 S. Monroe St., Suite 601, Tallahassee, FL 32301
Kathy Patrick, 1100 Louisiana, Suite 3400, Houston, TX 77002
Jerri A. Blair, 351 W. Alfred St., Tavares, FL 32778

Christopher J. Weiss, Two S. Orange Ave., Orlando, FL 32802
Sheila Rae Eschenberg, 221 Avenida De Paz, Indiatlantic, FL 32903
Bruce Cadle, 701 Andrew St., N.E., Palm Bay, FL 32905
Patrick Mahoney, 1345 N.E. Fourth Court, Boca Raton, FL 33432 and at 613 Second Street, N.E., Washington, DC 20002
Randall Terry, RR2, Box 196, Harpursville, NY 13787-9536

by /s/ Doris D. Brady
Judicial Assistant

Date: April 8, 1993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WOODED AREA
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APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 93-2407

MYRNA CHEFFER,
Plaintiff-Appellant,

v.

ROBERT McGREGOR, ET AL.,
Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
(Hon. G. Kendall Sharp, *U.S. District Judge*)

Before

TJOFLAT, *Chief Judge*,
DUBINA, *Circuit Judge*,
PAINE[1], *Senior District Judge*.

October 20, 1993

Mathew D. Staver and Jeffery T. Kipi, Liberty Counsel, Attorneys for Plaintiff-Appellant.

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[1] Honorable James C. Paine, Senior U.S. District Judge for the Southern District of Florida, sitting by designation.

James L. Reinman, Gayle Smith Swedmark, and Gerald B. Curington, Attorneys for Defendants-Appellees.

TJOFLAT, *Chief Judge*:

Myrna Cheffer appeals from the district court's denial of her motion for a preliminary injunction preventing the enforcement of a state court injunction that regulates antiabortion speech at an abortion clinic. Because the district court mistook the legal significance of the state court injunction, and therefore erred in its application of the law to the merits of Cheffer's motion, we vacate and remand.

I.

Perhaps few Americans are content with the current legal status of abortion in America. Many see a woman's ability to choose abortion as a part of her fundamental constitutional right of self-determination that is ill-protected by the wavering jurisprudence of the Supreme Court. Many others see the 1.4 million abortions each year as an American Holocaust permitted by the moral vacillation of the government. This case arises out of the clash of these opposing beliefs, and governmental attempts to restrict their free expression. The Aware Woman Center for Choice is a corporation that operates an abortion clinic in a residential neighborhood in Melbourne, Florida. Operation Rescue is a major antiabortion organization known for picketing abortion clinics such as the Aware Woman Center. The Honorable Robert McGregor is a Florida Circuit Judge. Judge McGregor's docket includes the case *Aware Woman Center for Choice v. Operation Rescue*, No. 91-2811-CA-16-K, which concerns the conflict that arose when Operation Rescue and others began an aggressive campaign of picketing against the abortion clinic. On April 8,

1993, Judge McGregor issued an Amended Permanent Injunction[1] in which he enjoined certain activities of Operation Rescue and others in a court-drawn "buffer zone" surrounding the abortion clinic. The injunction, which was (to say the least) legislative in tone, was directed at Operation Rescue, Operation Rescue America, Operation Goliath, their officers, agents, members, employees and servants, and Ed Martin, Bruce Cadle, Pat Mahoney, Randall Terry, Judy Madsen, and Shirley Hobbs, and all persons acting in concert or participation with them, or on their behalf, with notice in any manner or by any means of this order. This group (collectively "Operation Rescue" or "the state court defendants") was enjoined (1) At all times on all days, from entering the premises and property of the Aware Woman Center for Choice, Inc. Clinic (hereinafter Clinic) located at the northwest corner of U.S. Highway One and Dixie Way in Melbourne, Brevard County, Florida. (2) At all times on all days, from blocking, impeding, inhibiting, or in any other manner obstructing or interfering with access to, ingress into and egress from any building or parking lot of the Clinic. (3) At all times on all days, from congregating, picketing, patrolling, demonstrating or entering that portion of public right-of-way or private property within thirty-six (36) feet of the property line of the Clinic.... It is the intent of the court that the [defendants] may use, subject to other restrictions contained herein, the unpaved portion (the shoulder) on the south side of Dixie Way . . . . (4) During the hours of 7:30 a.m. through noon, on Mondays through Saturdays, during surgical procedures and recovery periods, from singing, chanting, whistling, shouting, yelling, use of bullhorns, auto horns, sound amplification equipment or other sounds or images observable to or within earshot of the patients inside the Clinic. (5) At all times on all days, in an area within three-hundred (300) feet of the Clinic, from physically approaching any person seeking the

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[1] Circuit Judge Wallace H. Hall had entered a prior injunction on September 30, 1992. In the Amended Permanent Injunction, Judge McGregor found that the prior injunction had not prevented "interference with ingress to . . . the Aware Woman Clinic."

services of the Clinic unless such person indicates a desire to communicate by approaching or by inquiring of the [defendants]. In the event of such invitation, the [defendants] may engage in communications consisting of conversation of a nonthreatening nature and by the delivery of literature within the three-hundred (300) foot area but in no event within the 36 foot buffer zone. Should any individual decline such communication, otherwise known as "sidewalk counseling", that person shall have the absolute right to leave or walk away and the [defendants] shall not accompany such person, encircle, surround, harass, threaten or physically or verbally abuse those individuals who choose not to communicate with them. (6) At all times on all days, from approaching, congregating, picketing, patrolling, demonstrating or using bullhorns or other sound amplification equipment within three-hundred (300) feet of the residence of any of the petitioners' employees, staff, owners or agents, or blocking or attempting to block, barricade, or in any other manner, temporarily or otherwise, obstruct the entrances, exits or driveways of the residences of any of the petitioners' employees, staff, owners or agents. A map attached to the injunction indicated a "buffer zone" to be established around the boundaries of the clinic property. The buffer zone included a public sidewalk in front of the clinic as well as a public street and adjacent right-of-way.

On its face, the injunction appears to "criminalize" various acts of peaceful protest, including the mere penetration of the buffer zone by anyone acting "in concert" with those named in the injunction. It purports to provide the following enforcement mechanism: Law enforcement authorities, pursuant to the protective provisions of the court's order, are authorized to arrest those persons who appear to be in willful and intentional disobedience of this injunction. Upon such arrest the person so arrested shall be admitted to bail upon the posting of a $500 cash or surety bond . . . . In the event of arrest and no bond being posted, the person arrested shall be promptly transferred to the Seminole County jail . . . . Such arrested persons shall be brought before the undersigned judge not later than 8:30 am of the day

following his confinement in the Seminole County jail.[2] The local police understood the injunction to require them to arrest "pro-life" individuals who violated the buffer zone. On April 11, 1993, approximately 50 apparently "pro-life" individuals were arrested for entering the buffer zone. Myrna Cheffer was not among them. Nevertheless, she filed this suit in federal district court seeking to enjoin enforcement of the state court injunction.[3]

Cheffer claimed that the injunction acted as a prior restraint on her free speech rights, and that the threat of arrest chilled her ability to exercise these rights. She sought a temporary restraining order as well as both preliminary and permanent injunctions to block the state court injunction. The district court denied the motions for a temporary restraining order and a preliminary injunction, finding that the balance of equities did not weigh in Cheffer's favor. The court deferred ruling on the motion for a permanent injunction. Cheffer now appeals.

We review a denial of an application for a preliminary injunction for abuse of discretion, adopting the district court's findings of fact unless clearly erroneous, but reviewing jurisdictional issues de novo. *Lucero v. Operation Rescue of Birmingham*, 954 F.2d 624, 627 (11th Cir. 1992). We consider the questions of standing and abstention in part II, then turn, in part III, to the merits of the case.

II.

An injunction is an extraordinary remedy that operates only

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[2] It is obvious to us that Judge McGregor did not intend the Amended Permanent Injunction to be enforced through the civil contempt process. See *Blalock v. United States*, 844 F.2d 1546, 1558-60 (11th Cir. 1988) (contrasting civil and criminal contempt). The injunction clearly attempts to circumvent a civil contempt process that the judge considered too cumbersome.

[3] An appeal of the injunction is currently before the Florida Supreme Court.

on the parties before the court. Legislation operates more broadly, extending to all actors within the legislature's territorial jurisdiction. Nevertheless, when Judge McGregor issued the Amended Permanent Injunction in the state case, he, in effect, created a criminal statute prohibiting "pro-life" free speech activity in a certain geographical location. Had he merely enjoined the defendants in the state suit from certain actions, Cheffer would have suffered no injury--she would be free to engage in peaceful speech activity on the sidewalk in front of the clinic. But by extending the injunction to nonparties and by attaching criminal penalties to activities otherwise protected by the Constitution, Judge McGregor crafted a law that seems to apply to Cheffer, who is neither a party nor an agent of any party.[4] It is this unusual characteristic of the injunction that seems to have misled the district court. We refuse to prefer form over substance; the injunction has all the attributes of a criminal statute and we will treat it accordingly.

A.

Although she was neither a party to the state suit nor one of those arrested for violating the buffer zone, Cheffer does not lack standing to bring this case. A plaintiff in federal court must satisfy the "case or controversy" requirement of Article III of the Constitution by showing that she has suffered an injury-in-fact that would be corrected by favorable decision in the lawsuit. *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 471-72, 102 S.Ct. 752, 758, 70 L.Ed.2d 700 (1982). [A]t an irreducible minimum, Art. III requires the party who invokes the court's authority to "show that he personally has suffered some actual or threatened injury as a

[4] Although we may be permitted our doubts as to the legitimacy of the injunction under Florida law (because, for one thing, it serves as a criminal sanction under the cloak of a civil injunction and thus may constitute an abuse of process), we assume, for the sake of argument, that Judge McGregor did not overstep his authority in crafting the order.

result of the putatively illegal conduct of the defendant," and that the injury "fairly can be traced to the challenged action" and "is likely to be redressed by a favorable decision." *Id.* (citations omitted) (quoting *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 99, 99 S.Ct. 1601, 1608, 60 L.Ed.2d 66 (1979), and *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 38, 41, 96 S.Ct. 1917, 1924, 1925, 48 L.Ed.2d 450 (1976)). Thus, a plaintiff who has not been prosecuted under a criminal statute does not normally have standing to challenge the statute's constitutionality. See *Boyle v. Landry*, 401 U.S. 77, 91 S.Ct. 758, 27 L.Ed.2d 696 (1971) (finding that plaintiffs who had neither been prosecuted nor specifically threatened with prosecution did not have standing).

Standing requirements to challenge speech restrictions, however, are less strict. "[I]n the First Amendment context, [l]itigants . . . are permitted to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression." *Virginia v. American Booksellers Assoc., Inc.*, 484 U.S. 383, 392-93, 108 S.Ct. 636, 643, 98 L.Ed.2d 782 (1988) (internal quotations omitted); see also *Secretary of State of Maryland v. Joseph H. Munson Co.*, 467 U.S. 947, 956-57, 104 S.Ct. 2839, 2846-47, 81 L.Ed.2d 786 (1984); *Broadrick v. Oklahoma*, 413 U.S. 601, 612, 93 S.Ct. 2908, 2916, 37 L.Ed.2d 830 (1973).[5] We conclude that Cheffer has standing to challenge the restrictions placed on her free speech by the Amended Permanent Injunction.

B.

Neither does the abstention doctrine block Cheffer's suit. The Supreme Court has directed that federal courts should not

[5] Under this rule of standing, it is unimportant that Cheffer has alleged that she intends to exercise her own rights to free speech.

intervene in ongoing state proceedings "when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief." See *Younger v. Harris*, 401 U.S. 37, 43-44, 91 S.Ct. 746, 750, 27 L.Ed.2d 669 (1971).[6]

As we have noted before, the initial inquiry in determining whether a federal court should abstain when asked to enjoin an ongoing state civil proceeding is whether an important governmental interest of the state is implicated by that civil action so that such an injunction would be an offense to the State's interest . . . likely to be every bit as great as it would be were this a criminal proceeding. *First Alabama Bank v. Parsons Steel, Inc.*, 825 F.2d 1475, 1483 (11th Cir. 1987) (internal quotations omitted), cert. denied, 484 U.S. 1060, 108 S.Ct. 1015, 98 L.Ed.2d 980 (1988). It appears that important state interests, including the enforceability of state court injunctions, are involved in the present case.

Younger abstention is only appropriate, however, when the federal constitutional claims at issue can be raised by the federal plaintiff in an ongoing state court proceeding. *Ohio Civil Rights Comm'n v. Dayton Christian Schools, Inc.*, 477 U.S. 619, 106 S.Ct. 2718, 91 L.Ed.2d 512 (1986) (holding that Younger applies "so long as in the course of [the state] proceedings the federal

[6] *Younger* itself expressed a fundamental "public policy against federal interference with state criminal prosecutions," 401 U.S. at 43, 91 S.Ct. at 750, but later cases have extended this deference to some state civil actions. In general, "[t]he policies underlying *Younger* are fully applicable to noncriminal judicial proceedings when important state interests are involved." *Middlesex County Ethics Comm. v. Garden State Bar Assoc.*, 457 U.S. 423, 431, 102 S.Ct. 2515, 2521, 73 L. Ed. 2d 116 (1982); see *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 107 S.Ct. 1519, 95 L. Ed. 2d 1 (1987). In particular, the Supreme Court extended the doctrine to cover the civil contempt process in *Juidice v. Vail*, 430 U.S. 327, 97 S.Ct. 1211, 51 L. Ed. 2d 376 (1977). The issue to be resolved is whether "the State's interests in the proceeding are so important that exercise of the federal judicial power would disregard the comity between the States and the National Government." *Pennzoil*, 481 U.S. at 11, 107 S.Ct. at 1526.

plaintiff would have a full and fair opportunity to litigate his constitutional claim"); see also *Juidice*, 430 U.S. at 337, 97 S.Ct. at 1218. In the instant case, Cheffer has no remedy in state court except to subject herself to a criminal contempt citation (which she probably could not resist on the ground that the underlying injunction is unconstitutional, see *In re Novak*, 932 F.2d 1397, 1401-02 (11th Cir.1991)). The Younger abstention doctrine therefore is inapplicable[7] and the district court has jurisdiction to hear Cheffer's claim.[8]

III.

It is against this backdrop, then, that the district court must consider the four prerequisites to preliminary injunctive relief. Cheffer had "the burden of proving: (1) a substantial likelihood of success on the merits; (2) a substantial threat of irreparable injury; (3) [her] own injury outweighs the injury to [the clinic]; and (4) the injunction would not disserve the public interest." *Tally-Ho, Inc. v. Coast Community College Dist.*, 889 F.2d 1018, 1022 (11th Cir.1990); *Lucero*, 954 F.2d at 627. The district court denied the motion for a preliminary injunction because it determined that Cheffer had not demonstrated that the balance of equities weighed in her favor. We conclude that the district court's misunderstanding of the legal significance of the injunction improperly colored its analysis. We must, therefore, vacate the order and remand the matter to the district court for further

[7] The defendants do not claim that the abstention doctrines require Cheffer to submit to arrest in order to be able to challenge the restriction in state court.

[8] Cheffer argues that the issuance of a preliminary injunction in the free speech context turns solely on whether the challenged action is unconstitutional. In other words, she suggests that "Once a violation of the First Amendment is established, preliminary injunctive relief is mandated." She relies, for this proposition, on *Gold Coast Publications, Inc. v. Corrigan*, 798 F.Supp. 1558 (S.D. Fla. 1992). While we agree that it is unlikely that an unconstitutional restriction would fail to warrant an injunction, we prefer that the district court follow the traditional analysis.

consideration of the plaintiff's motion for a preliminary injunction.

A.

The district court must first consider whether Cheffer demonstrated a substantial likelihood of success on the merits. When reduced to its essentials, Judge McGregor's Amended Permanent Injunction, by operating on persons not before the court, serves as a statute of local effect regulating picketing by antiabortion speakers. As a viewpoint-based restriction operating in a traditional public forum (the public streets and sidewalks around the clinic), it is subject to a most stringent review: In places which by long tradition or by government fiat have been devoted to assembly and debate, the rights of the State to limit expressive activity are sharply circumscribed. At one end of the spectrum are streets and parks which "have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Hague v. CIO*, 307 U.S. 496, 515, 59 S.Ct. 954, 963, 83 L.Ed. 1423 (1939). In these quintessential public forums, the government may not prohibit all communicative activity. For the State to enforce a content-based exclusion it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end. *Carey v. Brown*, 447 U.S. 455, 461, 100 S.Ct. 2286, 2290, 65 L.Ed.2d 263 (1980). *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45, 103 S.Ct. 948, 954-55, 74 L.Ed.2d 794 (1983). That the clinic is in a residential neighborhood does not remove the characterization of the adjoining streets and sidewalks as traditional public fora. *Frisby v. Schultz*, 487 U.S. 474, 479, 108 S.Ct. 2495, 2500, 101 L.Ed.2d 420 (1988) ("[O]ur decisions identifying public streets and sidewalks as traditional public fora are not accidental invocations of a 'cliche,' but recognition that '[w]herever the title of streets and parks may rest, they have immemorially been held in trust for

the use of the public.' " (citations omitted)).[9]

That the speech restrictions at issue here are viewpoint-based cannot seriously be doubted.[10] The order enjoins Operation Rescue, Operation Rescue America, Operation Goliath, their officers, agents, members, employees and servants, and Ed Martin, Bruce Cadle, Pat Mahoney, Randall Terry, Judy Madsen, and Shirley Hobbs, and all persons acting in concert or participation with them or on their behalf . . . . Such a restriction is no more viewpoint-neutral than one restricting the speech of "the Republican Party, the state Republican Party, George Bush, Bob

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[9] In any case, the forum issue is not dispositive since the restriction is not viewpoint neutral. Even a nonpublic forum can only be regulated in a neutral fashion: Control over access to a nonpublic forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral. Although a speaker may be excluded from a nonpublic forum if he wishes to address a topic not encompassed within the purpose of the forum, or if he is not a member of the class of speakers for whose especial benefit the forum was created, the government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject. *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 806, 105 S.Ct. 3439, 3451, 87 L. Ed. 2d 567 (1985) (citations omitted). A restriction on "pro-life" speech would not even be permissible in the context of a nonpublic forum.

[10] We note that the Ninth Circuit reached a different result on similar facts in *Portland Feminist Women's Health Center v. Advocates for Life, Inc.*, 859 F.2d 681 (9th Cir. 1988). There an injunction against "demonstrating or distributing literature ...; shouting, screaming, chanting, or yelling" by antiabortion organizations and those acting in concert was deemed to be content-neutral and thus a reasonable time, place, or manner restriction on speech. *Id.* at 684, 686. The court argued The preliminary injunction is not a content-based restriction of expression. It refers not at all to the specific viewpoints that the advocates press, nor even to the general issues raised at their demonstrations. Rather, it focuses exclusively on the location and manner of expression. It protects the clinic from loudness and physical intimidation, not from content of speech. Therefore, we apply to the preliminary injunction the rules regarding the constitutionality of "time, place, and manner" regulations of speech. *Id.* at 686. We do not find this reasoning at all persuasive.

Dole, Jack Kemp and all persons acting in concert or participation with them or on their behalf." The practical effect of this section of the injunction was to assure that while "pro-life" speakers would be arrested, "pro-choice" demonstrators would not.[11]

A viewpoint-specific restriction in a traditional public forum is unconstitutional unless (1) it is necessary to serve a compelling state interest and (2) it is narrowly drawn to achieve that end. See *Carey*, 447 U.S. at 461-62, 100 S.Ct. at 2290. The state court injunction does not seem to be either.

B.

The second inquiry concerns the threat of irreparable injury faced by the plaintiff. The Supreme Court has noted that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373, 96 S.Ct. 2673, 2690, 49 L.Ed.2d 547 (1976); see *New York Times Co. v. United States*, 403 U.S. 713, 91 S.Ct. 2140, 29 L.Ed.2d 822 (1971).

C.

The third inquiry is into the relative injury to Cheffer and to the clinic. The district court concluded that Cheffer did not carry her burden as to this point.

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[11] This is apparently precisely what occurred. Several of those arrested testified (at a preliminary hearing convened by Judge McGregor as provided for in the injunction) that they were designated for arrest by clinic workers and police officers because they were perceived to be "pro-life." Judge McGregor accepted this interpretation of the intent of the injunction and explained (to the arrestees): [T]he injunction did not pertain to those on the other side of the issue, because the word in concert with means in concert with those who had taken a certain position in respect to the clinic, adverse to the clinic. If you are saying that is selective basis that the pro-choice were not arrested when pro-life was arrested, that's the basis of that selection.

It is difficult indeed to weigh the relative value of different constitutional rights. Our sister circuit described a similar abortion protest case as a "clash . . . between constitutional rights defined by the Supreme Court: an old one tracing its roots to the speech clause of the First Amendment and before, and a new one stemming from *Roe v. Wade*." *Mississippi Women's Medical Clinic v. McMillan*, 866 F.2d 788, 791 (5th Cir.1989). We note, however, that in the instant case there is no indication in the record that women were actually prevented from obtaining abortions at the Aware Woman Center for Choice. The clash here is between an actual prohibition of speech and a potential hinderance to the free exercise of abortion rights.[12] Should the district court issue an injunction barring the state court from enforcing its injunction as a criminal statute, it would promote only speech and expressive conduct, not assault, trespass, or destruction of property.

D.

Finally, the district court must consider whether the issuance of the federal injunction would disserve the public interest. The importance of "the principle that debate on public issues should be uninhibited, robust, and wide-open" suggests that the issuance of the injunction would be no disservice at all.

It is tempting, of course, to entertain the argument that the speech in this case is disruptive, discourteous, and offensive, but that is irrelevant. The Supreme Court recently reminded us As

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[12] In the Amended Permanent Injunction the state circuit court recites a variety of inconveniences (e.g., "As vehicular traffic approached the [clinic] area it would, in response to the congestion, slow down. If the destination of such traffic was either of the two parking lots of the [clinic], such traffic slowed even more, sometimes having to momentarily hesitate or stop until persons in the driveway moved out of the way."). (Emphasis added). Those apparently isolated incidents which were more intrusive (e.g. "stalking") are, for the most part, already tortious or criminal.

we have often had occasion to repeat, "[T]he fact that society may find speech offensive is not a sufficient reason for suppressing it. Indeed, if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection." *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 55, 108 S.Ct. 876, 882, 99 L.Ed.2d 41 (1988) (quoting *FCC v. Pacifica Foundation*, 438 U.S. 726, 745, 98 S.Ct. 3026, 3038, 57 L.Ed.2d 1073 (1978)). "If there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *United States v. Eichman*, 496 U.S. 310, 319, 110 S.Ct. 2404, 2410, 110 L.Ed.2d 287 (1990) (quoting *Texas v. Johnson*, 491 U.S. 397, 414, 109 S.Ct. 2533, 2544, 105 L.Ed.2d 342 (1989)). *Simon & Schuster v. New York Crime Victims Bd.*, --- U.S. ----, ----, 112 S.Ct. 501, 509, 116 L.Ed.2d 476 (1991). We protect much that offends in the name of free speech--we cannot refuse such protection to those who find abortion morally reprehensible.

IV.

The district court treated the state court injunction as an ordinary injunction when it had the effect of a criminal statute. Consequently, the order of the district court was founded on a mistake of law. We vacate the order, and remand for further consideration of the issuance of a preliminary injunction in light of this opinion.

IT IS SO ORDERED.

PAINE, District Judge, dissenting:

I would remand this case with instructions to the district court to enjoin enforcement of the state court's Amended Permanent Injunction against Myrna Cheffer ("Cheffer"), a person shown not to be acting in concert with the respondents in the state case.

The central facts of this matter concern the harassment of the function or undertakings of the Aware Woman Center for Choice, an abortion clinic. Prior restraint of the constitutional right of free speech by Cheffer is a concomitant issue adequately treated by the district court order. The strong remand suggested by the majority, bottomed on free speech, provides an imprecise emphasis.

The Amended Permanent Injunction details a factual background omitted by the majority opinion. On September 30, 1992, Judge Wallace H. Hall had entered an injunction against Respondents, three pro-life organizations and six individual pro-life activists, prohibiting interference with ingress to the Aware Woman Center. On April 8, 1993, following a three-day evidentiary hearing on Petitioners' motion to modify the injunction, Judge Robert McGregor found, in summary, that: A. Despite the previous injunction, persons continued to interfere with ingress to the clinic, by standing on the paved portions of Dixie Highway, standing, kneeling, and sitting on the unpaved portions of the road, approaching moving vehicles on the paved surface, and marching in a picket line that traversed the entrance driveways to the facility's two parking lots. Cars approaching the area were forced to slow down, particularly those wishing to enter the parking lots. B. Crowds of up to 400 people would gather at the clinic one to three times per week. The crowds included, not only the named Respondents, but other pro-life demonstrators, pro-choice demonstrators, up to 50 law enforcement officers engaging in crowd and traffic control, and media representatives. C. The gatherings would feature singing, chanting, whistling, music, and bullhorns. Pro-life and pro-choice groups would shout and yell at each other, often competing to make the most noise. D. The police were sometimes forced to erect barricades to separate the rival groups and permit traffic flow. The pro-life demonstrators would generally remain in the public right of way, while their pro-choice counterparts occupied private property on the clinic's lawn and parking lot. E. Vehicles slowing to enter the clinic's driveway would be approached by persons designated by

Respondents as "sidewalk counselors," who attempted to hand anti-abortion literature to the occupants and discourage their use of the clinic. F. The clinic has fences on its west and north sides. Persons would occasionally climb a ladder above the fences to shout at staff and patients entering the facility. On one occasion a demonstrator yelled to a clinic staffer, "I pray that God strikes you dead now!" G. Since the entry of the previous injunction, Respondent Bruce Cadle and others in concert with him have approached the private residences or temporary lodging places of clinic employees, to confront the occupants (including minor children), picket, shout at passers-by, contact neighbors, and hand out literature identifying the employee as a "baby killer." H. On one occasion, Cadle and others demonstrated outside a motel where a staff physician was staying. While Cadle remained outside, his cohorts entered the motel lobby, yelling "child murderer" and "baby killer." The disturbance delayed the doctor's departure for the clinic by one-half hour. I. The same physician was once delayed outside the clinic while Cadle and others stood in front of his car, screaming "baby killer--we don't want you here in Melbourne." This physician further witnessed demonstrators running alongside, and in front of, patients' vehicles, pushing pamphlets in car windows to persons who had not indicated any interest therein. Patients experiencing this confrontation manifested a higher level of anxiety and hypertension, requiring a heavier sedation, and its associated medical risks, to undergo the surgical procedure. The noise of singing, chanting, and shouting also caused stress to patients during the surgery and recuperation. In addition, the doctor observed prospective patients turn away from the crowd in the clinic's driveway to return at a later date, which only increases the risk associated with the procedure. J. While driving home one evening, the same physician was followed by a person associated with Respondents, who pretended to shoot him from an adjoining vehicle. As a result of these activities, and the shooting of a physician in North Florida by an anti-abortionist, the physician terminated his employment with the clinic. K. Respondents or persons in concert with them recorded the license plate numbers of clinic patients, obtained their home addresses,

and contacted the patients. On occasion, multiple telephone calls have been placed to the clinic, jamming their telephone lines and making it impossible to summon an ambulance for a medical emergency. Patients and staff are sometimes followed in a stalking manner when they leave the clinic, causing them great apprehension. Judge McGregor thereupon entered the Amended Permanent Injunction against Respondents, Operation Rescue, Operation Rescue America, Operation Goliath, Ed Martin, Bruce Cadle, Pat Mahoney, Randall Terry, Judy Madsen, Shirley Hobbs, and all persons acting on behalf of or "in concert with" them,[1] the prohibitions of which are summarized by the majority.

This federal proceeding involves the constitutional challenge of Cheffer, a pro-life activist who claims that she is not working in concert with the named Respondents, wishes to engage in peaceful "sidewalk counseling" near the clinic, but fears arrest because (i) 50 similarly independent pro-life demonstrators were arrested on April 10, 1993, and (ii) Judge McGregor commented, during their initial appearances, that he considered any pro-life demonstrator to be acting in concert with the named Respondents for purposes of the Amended Permanent Injunction. On April 13, 1993, Cheffer filed a Verified Complaint for Declaratory Judgment and Preliminary and Permanent Injunctive Relief, Motion for Temporary Restraining Order, Motion for Preliminary Injunction and Permanent Injunction, with supporting affidavits and memoranda of law, seeking to prevent enforcement of the Amended Permanent Injunction against her. The next day, the district court denied the requests for a temporary restraining order

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[1] Florida Rule of Civil Procedure 1.610(c), like Federal Rule of Civil Procedure 65(d), provides that "[e]very injunction ... shall be binding on the parties to the action, their officers, agents, servants, employees, and attorneys and on those persons in active concert or participation with them who receive actual notice of the injunction." These procedural rules are derived from the common law doctrine that "defendants may not nullify a decree by carrying out prohibited acts through aiders and abettors, although they were not parties to the original proceeding." *Regal Knitwear Co. v. NLRB*, 324 U.S. 9, 14, 65 S.Ct. 478, 481, 89 L. Ed. 661 (1945).

and preliminary injunction "[b]ased on a review of the case file and the relevant law," without conducting an evidentiary hearing or permitting further briefing.

The majority concludes that "the district court mistook the legal significance of the state court injunction . . . ." Based upon a provision authorizing the arrest of willful violators, and the subsequent arrest of persons who claim no association to the state court litigation, the majority, in the name of "substance over form," but without citation of legal precedent, elects to treat the Amended Permanent Injunction as a criminal statute and remands the case so that the district court may do the same.[2] This Court has, however, previously affirmed an arrest, detention, and conviction pursuant to a civil injunction that expressly provided: "Anyone having notice of this order who violates any of the terms thereof shall be subject to arrest, prosecution and punishment by imprisonment or fine, or both, for criminal contempt . . . ." *United States v. Hall*, 472 F.2d 261, 263-64 (5th Cir. 1972) (emphasis added).[3] Furthermore, this Court has analyzed an injunction purportedly directed at "all persons who are residents of Colquitt County, Georgia" as "impermissibly broad," narrowed its application to the parties, then affirmed the injunction as modified. *Harrington v. Colquitt County Bd. of Educ.*, 449 F.2d 161 (5th Cir. 1971). The majority's unprecedented decision to assume an impossibility--that a state court judge has passed legislation--skews its analysis.

This improper analytical framework affects the threshold question whether Cheffer, as a supposed stranger to the litigation, has standing to attack the Amended Permanent Injunction.

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[2] In so doing, the majority manages to read Judge McGregor's mind, determining that he "considered [the civil contempt process] too cumbersome."

[3] The Eleventh Circuit, in the *en banc* decision *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981), adopted as precedent decisions of the former Fifth Circuit rendered prior to October 1, 1981.

Because the majority has deemed the order an act of legislation, it invokes the substantial overbreadth doctrine, which permits First Amendment litigants "to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression." *Virginia v. American Booksellers Assoc., Inc.*, 484 U.S. 383, 392-93, 108 S.Ct. 636, 643, 98 L.Ed.2d 782 (1988); see also *Massachusetts v. Oakes*, --- U.S. ----, ---- - ----, 109 S.Ct. 2633, 2637-38, 105 L.Ed.2d 493 (1989). Under this analysis, Cheffer's own intention to speak is considered by the majority to be "unimportant."

The substantial overbreadth doctrine, however, has no application to injunctions, which bind only the parties and do not chill the conduct of others. *United States v. Local 560 (I.B.T.)*, 974 F.2d 315, 344 n. 16 (3rd Cir. 1992). A non-party ordinarily lacks standing to assert the free speech constitutional rights of parties subject to an injunction. *Radio & Television News Ass'n v. United States Dist. Court*, 781 F.2d 1443, 1448 (9th Cir. 1986); see generally *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 80-81, 98 S.Ct. 2620, 2634-35, 57 L.Ed.2d 595 (1978) (discussing third-party standing). Cheffer's standing hinges entirely on her intention to speak and the "credible threat" of prosecution posed by Judge McGregor's statements regarding his interpretation of the injunction. *Kolender v. Lawson*, 461 U.S. 352, 355 n.3, 103 S.Ct. 1855, 1858 n.3, 75 L.Ed.2d 903 (1983); see also *Steffel v. Thompson*, 415 U.S. 452, 459-60, 94 S.Ct. 1209, 1215-16, 39 L.Ed.2d 505 (1974). Cheffer has proven a sufficient connection to the state court injunction to confer standing.

A review of *Younger v. Harris*, 401 U.S. 37, 41-43, 46, 91 S.Ct. 746, 749- 50, 751, 27 L.Ed.2d 669 (1971), and its progeny leads to the conclusion that abstention is inappropriate here, because Cheffer is not a party to the state case, nor are her interests "intertwined" with those of the parties. See *Hicks v.*

Miranda, 422 U.S. 332, 348-49, 95 S.Ct. 2281, 2291-92, 45 L.Ed.2d 223 (1975); *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 928-29, 95 S.Ct. 2561, 2566-67, 45 L.Ed.2d 648 (1975).

The majority opinion directs that the district court's order be vacated, remanding the case for application of the four-part test for preliminary injunctive relief.[4] But further proceedings below are unwarranted. Only different instructions to the district court are needed. When the Amended Permanent Injunction is properly viewed as an injunction, it becomes clear that the state court lacks the power to reach Cheffer. "[C]ourts . . . may not grant an injunction so broad as to make punishable the conduct of persons who act independently and whose rights have not been adjudged according to law." *Regal Knitwear Co. v. NLRB*, 324 U.S. 9, 13, 65 S.Ct. 478, 481, 89 L.Ed. 661 (1945).[5] Given the "credible threat" of prosecution posed by Judge McGregor's comments, see *Kolender*, 461 U.S. at 355 n.3, 103 S.Ct. at 1858 n.3, Cheffer is entitled to an order prohibiting enforcement of the Amended

[4] The implication that the district court did not examine the request for preliminary injunction in light of (a) the likelihood of success on the merits, (b) irreparable injury, (c) relative injury to Cheffer and the clinic, and (d) whether issuance of the federal injunction would disserve the public interest is not supported by the record. The district court's order makes note of these requirements and concludes that the burden of proof was not met as to items (c) and (d).

[5] In *United States v. Hall*, 472 F.2d 261, 264-65 (5th Cir. 1972), this Court held that an injunction against obstructing school children's access to class could be applied to a non-party acting independently of the parties, because his conduct interfered with the plaintiff children's right to attend school and the defendant school board's duty to provide schooling. But this holding was clearly affected by the non-party's prior notice of the injunction and statement to police that he specifically intended to violate it. See 472 F.2d at 267 ("Rather than challenge [the injunction] by the orderly processes of law, he resorted to conscious, willful defiance."). Under the instant circumstances, Cheffer should be bound by the Amended Permanent Injunction only if she acted in concert with the named state litigants.

Permanent Injunction against her.[6]

[6] Nothing in this dissent, or the majority opinion for that matter, would prevent entry of a separate injunction against Cheffer if she harasses, intimidates, or otherwise abridges the rights of clinic patients or staff employees.

APPENDIX D

IN THE SUPREME COURT OF FLORIDA

OPERATION RESCUE, et al., Appellants,	)	
vs.	)	CASE NO. 81,905
WOMEN'S HEALTH CENTER, INC., et al., Appellees.	)	District Court of Appeal, Fifth District - No. 93-969

APPELLEES' EMERGENCY MOTION TO REQUIRE ENFORCEMENT OF INJUNCTIVE ORDER AND FOR SANCTIONS AND ALTERNATIVE EMERGENCY MOTION FOR ORDER ON MANDATE DIRECTING CITY TO ENFORCE VALID COURT ORDER

Pursuant to the Court's inherent authority and the Article V, Section 3(b)(7) power of the Court to issue "all writs necessary to the complete exercise of its jurisdiction," the Appellees seek an emergency order directed to the City of Melbourne, Florida and recite the following facts:

1. The City of Melbourne has not provided adequate protection to the Aware Woman Center for Choice, Inc. ("Clinic"), a lawful business providing licensed health care in the city and has failed to protect the rights of ingress and egress of the employees and patients of that health care facility.

2. This failure of the City to provide protection necessitated the legal action taken by the Clinic which resulted in a temporary injunction issued on October 25, 1991 and a

permanent injunction dated September 30, 1992. These injunctions protected the ingress and egress of the Clinic's personnel and patients.

3. The City's indifferent attitude toward the 1991 and 1992 injunctions and the rights of the Clinic, its employees and its patients allowed the groups which have sought to unlawfully interfere with the Clinic's business to continue to disrupt the operation of the Clinic. Indeed, as the record in this case and the findings of the trial judge demonstrate, the interference with the Clinic operation actually increased in early 1993.

4. The Clinic, faced with an escalating pattern of intimidation and harassment, and with continued blocking of ingress and egress, returned to Court once more and obtained yet another injunction on April 8, 1993. This injunction order (which was the subject of this appeal) was obtained on testimony which clearly demonstrated the continued pattern of disruption of the Clinic and activities which were inconsistent with public safety. One of the important witnesses called to testify was Capt. Allgeyer of the City of Melbourne's police department and he testified that it would aid the Melbourne Police to have a clear court order marking out the areas where demonstrators could exercise their free speech rights without interfering with the Clinic operation and the patients' travel to and from the Clinic.

5. This third injunctive order has now been affirmed by this Court in a decision dated October 28, 1993 and there can be no doubt that it is an effective and enforceable order.

6. The City of Melbourne is refusing to enforce the order.

7. The Clinic has contacted the City Attorney and sought the enforcement of the court order. In a letter to the City Attorney, the Clinic's counsel has pointed out that the Attorney General of Florida has given an opinion which states that the April 1993 injunctive order is to be enforced, that the press reports that

legal scholars and even opposing counsel in this case have stated their view that the order is in full force. (A copy of the letter and exhibits sent to the City Attorney are attached as Exhibit 1 to this motion.)

8. The Clinic is being subjected to new harassment contrary to a valid court order. The affidavits, attached as Exhibit 2 to this motion, state the facts of this continuing disruption in violation of the April 1993 order and the earlier 1991 and 1992 orders.

9. The Appellees are without any adequate remedy to secure the protection to which they are entitled by law and by the specific court orders.

10. The Appellees have had to go to additional expense to obtain enforcement of these orders, including consultation with the Attorney General, contacts with City officials and the filing of these papers. The Appellees have incurred costs solely because of the improper refusal of the City of Melbourne to enforce a court order.

Therefore, the Appellees seek the following relief:

1. The Court is requested to issue an emergency rule to show cause to the City of Melbourne to explain why it has not enforced a lawful injunction which has been affirmed by this Court;

2. Alternatively, the Court is requested to issue an emergency mandate to include directions to the City of Melbourne (and all other jurisdictions having police powers which are necessary to the enforcement of the injunctive order) to provide the protection for the Clinic, its personnel and its patients which has been ordered by the trial court and affirmed by this Court;

3. The Court is requested to order the City of Melbourne

to immediately take action to fully enforce the April 1993 injunctive order until there is a court order relieving the City from that burden;

4. The Court is requested to award attorney fees, costs and expenses to the Appellee as sanctions for the City's unreasonable refusal to follow a valid court order; and

5. The Court is requested to take such other action as may be necessary to fully protect the Clinic, its employees and patients and such action as is necessary in the interests of justice.

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APPENDIX E

IN THE SUPREME COURT OF FLORIDA

OPERATION RESCUE, et al., Appellants,	)	
vs.	)	CASE NO. 81,905
WOMEN'S HEALTH CENTER, INC., ET AL., Appellees.	)	District Court of Appeal, Fifth District No. 93-969

CITY OF MELBOURNE'S RESPONSE TO EMERGENCY MOTIONS

The City of Melbourne, Florida, [hereinafter "the City"] responds to the emergency motions filed by the Aware Woman Center for Choice, Inc. [hereinafter "the Clinic"], and states:

1. The City objects to any orders entered against it, particularly to orders imposing sanctions of attorney's fees and costs, because the City has never been a party to this action. (In fact, the City sought to intervene and to seek clarification of its duty regarding the McGregor injunction, and the Clinic opposed intervention by the City. The Circuit Court denied the City's Motion To Intervene and to Clarify Amended Permanent Injunction.)

It would be unjust to impose such severe sanctions against the City when the City has not had the opportunity to defend itself and has not had the opportunity to correct some of the inaccurate facts upon which the Clinic would have this Court impose

judgment.

2. The City specifically objects to the Clinic's allegations that the City has failed to provide the Clinic protection and that the City has had an indifferent attitude toward the injunctions. To the contrary, throughout the eight-year history of the controversy surrounding the Clinic, the City has consistently and even-handedly endeavored to keep the peace by balancing the rights of the Clinic and its patients with the constitutional dictates of the first amendment. Specifically, the City would show as follows:

A. The City has always been conscientious in enforcing applicable state laws at the Clinic site.

B. Contrary to the Clinic's unfounded allegations, the City has conscientiously enforced the terms of the injunctions and has arrested 144 people for violations of the injunctions.

C. The City's conscientious and consistent enforcement of the injunctions continued up until receipt of the opinion from the 11th Circuit Court of Appeals that cast serious doubt on the constitutionality of the McGregor injunction.

D. Although the City ceased to enforce the McGregor injunction upon receipt of the 11th Circuit opinion, the City continues vigorously to enforce applicable state laws at the Clinic site.

3. Unlike the present cause, in which the City has never been a party, the City is a party in *Cheffer v. McGregor*, No. 93-2407, 1993 U.S. App. LEXIS 27209 (11th Cir. Oct. 20, 1993). As this Court is aware, in that case a third party independently challenged the enforcement of the McGregor injunction. The 11th Circuit's opinion in an interlocutory appeal has cast serious doubt about the validity of the injunction. Particularly alarming were the 11th Circuit's observations during oral argument that enforcement

of the injunction could subject the law enforcement authorities to liability for false arrest.

Those observations, as well as the strong statements in the opinion itself, raise deep concerns about whether continued enforcement of the injunction would subject the City to potential liability for federal civil rights violations and to liability for warrantless arrests. Until this issue is finally resolved by the federal courts, the City has continued its vigorous enforcement of state laws, but has ceased enforcing the injunction to avoid exposure to liability.

4. A further concern is that the McGregor injunction merely authorizes the City to enforce the injunction and fails to order or to require enforcement. The City fears that the lack of a clear mandate in the injunction will subject the City to further liability if the City elects to enforce an injunction of questionable validity.

5. Throughout this controversy, the City has taken the position that it is inappropriate for the City to scrutinize the merits of, or to judge the lawfulness of, the McGregor injunction. This is in keeping with the principle that law enforcement authorities charged with the duty of executing court orders must not be called upon to answer for the legality of decisions which they are powerless to control. *See, e.g., Turney v. O'Toole*, 898 F.2d 1470 (10th Cir. 1990). Thus, the City committed itself to enforcing the injunction without question and without hesitation until directed to do otherwise by a court of law. It appears, however, that the llth Circuit's strong opinion doubting the lawfulness of the injunction likewise casts doubt as to whether the City would be immune from furthEr enforcement of an order that has been so seriously questioned. This Court should decline to force the City into such potential legal exposure until such time as the apparent conflict between the opinions of this Court and the llth Circuit has been resolved.

6. In addition, the Clinic's emergency motions are directed only to the City, although the McGregor injunction authorizes all law enforcement authorities to arrest those in violation of the injunction. It would be enormously unfair for this Court to grant the relief requested by the Clinic as to the City of Melbourne and to allow the other law enforcement authorities to escape both the legal liability and the other burdens imposed by an order of this Court. Indeed, the Clinic's harsh portrayal of the City in the emergency motions is particularly unjust in that no other law enforcement authority has ever even attempted to enforce the injunctions, and it is the City alone that has undertaken the task.

7. Finally, there is no authority for the imposition of the attorney's fees and costs sanctions requested by the Clinic against the City, who is an innocent non-party law enforcement agency, who throughout merely attempted in good faith to follow the law as it best understood it.

WHEREFORE, the City respectfully requests this Court to deny each and every request of the Clinic in its emergency motions.

Respectfully requested,
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I HEREBY CERTIFY that a true and correct copy of the foregoing City of Melbourne's Response to Emergency Motion has been furnished by U. S. Mail, postage prepaid, this 9th day of November, 1993, to the following:

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(2)

Supreme Court, U.S.
FILED
JAN 10 1994
OFFICE OF THE CLERK

No. 93-880

In The

Supreme Court of the United States

October Term, 1993

JUDY MADSEN, ED MARTIN and SHIRLEY HOBBS,

Petitioners,

v.

WOMEN'S HEALTH CENTER, INC., AWARE WOMEN CENTER FOR CHOICE, INC., EPOC CLINIC, INC. and CENTRAL FLORIDA WOMEN'S HEALTH ORGANIZATION, INC.,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Florida

RESPONSE TO THE PETITION FOR WRIT OF CERTIORARI

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3pp

Recognizing the confusion which has been introduced into the law by the decision of the Eleventh Circuit Court of Appeal in a collateral case, the Respondents do not oppose the petition.

The unanimous opinion of the Supreme Court of Florida from which the Petitioners seek relief is an application of settled law to the specific facts of this case and it is a statement of traditional time, place and manner restrictions. Were the Supreme Court of Florida opinion the only court action addressing the validity of the trial court injunction, the Respondents would oppose the granting of the petition for Writ of Certiorari.

However, there is another opinion which creates confusion about the validity of the injunctive order and that opinion, issued by the Eleventh Circuit Court of Appeal in a collateral federal case, seems to suggest that the injunctive order violates principles protecting free speech. Although that order was entered in a case which was before the Eleventh Circuit without a record and in a context where the only issue should have been the propriety of an order dismissing the collateral attack on a state court injunctive order, the Eleventh Circuit opinion seems to suggest that the state trial judge was in error. Because of the extraordinary holding of the Eleventh Circuit opinion in this collateral case, a holding which the Eleventh Circuit concedes is in conflict with the decision of another circuit and which is, in fact, in conflict with the decisions of several circuits, the Respondents fear that, if a mandate issues from the Eleventh Circuit, the federal District Judge may read the Eleventh Circuit opinion as

foreclosing important issues. Any federal order against the trial judge and the other defendants in the federal case would expose the clinic to a period of renewed harassment.

The Respondents are confident of their legal position as vindicated by the unanimous Supreme Court of Florida decision and believe that the most orderly process to resolve the confusion introduced by the Eleventh Circuit opinion is to agree that this Court should accept jurisdiction.

The Respondents do not agree with the Petitioners' characterizations of the law in the various federal circuits and the state courts and retain their right to argue that law if the Court accepts jurisdiction.

Respectfully submitted,

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Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

No. 93-880

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1993

JUDY MADSEN, et al.,

Petitioners,

- v. -

WOMEN'S HEALTH CENTER, INC., et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

RESPONSE TO MOTION TO STRIKE

Operation Rescue, Patrick Mahoney, Randall Terry, and Bruce Cadle (hereafter "OR et al."),[1] Petitioners in No. 93-833 and Respondents in No. 93-880 (see Rule 12.4), hereby oppose the motion of Petitioners Judy Madsen et al. (hereafter, "Madsen et al.") (No. 93-880) to strike the petition for certiorari of OR et al. (No. 93-833). The motion is procedurally improper and substantively meritless. This Court should therefore deny the motion.

I. Background

Women's Health Center, Inc., et al. (hereafter "WHC et al."), plaintiffs in the state circuit court and Respondents in this Court in both Nos. 93-833 and 93-880, obtained an

[1]None of these parties is a corporation. See Rule 29.1.

amended permanent injunction in the Florida circuit court against both Madsen et al. and OR et al. That amended permanent injunction, which the Supreme Court of Florida later affirmed, is the subject of both petitions for certiorari in this Court (Nos. 93-833 and 93-880).

Madsen et al. and OR et al. elected to pursue separate appeals, to the Fifth District Court of Appeal of Florida, from the amended permanent injunction. Under the Florida Rules of Appellate Procedure, each set of appellants remained party to the other appellants' appeal. The Florida rules designate as an "appellee" in a case "Every party in the proceeding in the lower tribunal other than an appellant," Rule 9.020(f), Fla. R. App. P. (emphasis added). Thus, the appeal of defendants Madsen et al. brought with it both the plaintiffs WHC et al. and fellow defendants OR et al. Likewise, the subsequent, separate appeal of defendants OR et al. brought with it both the plaintiffs WHC et al. and fellow defendants Madsen et al.[2]

After appealing, Madsen et al. successfully petitioned for certification of the case to the Supreme Court of Florida, which accepted jurisdiction. This step simply transferred the appeal proceedings, in their entirety, from the Fifth District Court of Appeal to the Supreme Court of Florida. See Rule 9.125(g), Fla. R. App. P. Thus, both WHC et al. and OR et al. remained parties to the proceedings in the state supreme court.[3] Both Madsen et al. and OR et al. urged the state supreme court to reverse the injunction.

---

[2]This practice of automatically bringing all parties to a lower court proceeding before the reviewing court is precisely the practice this Court follows. See Rule 12.4 ("All parties to the proceeding in the court whose judgment is sought to be reviewed shall be deemed parties in this Court . . . " and "All parties other than petitioners shall be respondents . . .").

[3]It is therefore not at all surprising that the Supreme Court of Florida permitted OR et al. to file a brief as "Certain Respondents/Appellants" instead of requiring OR et al. to appear as amici. See Appendix A.

The Supreme Court of Florida affirmed. In its opinion affirming the injunction, the state supreme court drew no distinction between OR et al. and Madsen et al. Instead, the court simply referred to "Operation Rescue and others (Operation Rescue)," App. A-2, and referred to all of the defendants-appellants generically as "Operation Rescue," see App. A-10, 12, 14-17, 19-24. Indeed, the state supreme court described the appeal before it as having been taken by Operation Rescue, App. A-10, and described the matter before it as "the trial court's order," id., not the appeal of only certain parties. Clearly, the Supreme Court of Florida was -- properly -- adjudicating the case as to the plaintiffs-appellees (WHC et al.) and both groups of defendants-appellants, i.e., Madsen et al. and OR et al.

OR et al. (No. 93-833) and Madsen et al. (No. 93-880) filed separate, timely petitions for certiorari in this Court.

II. Argument

Madsen et al. have moved to strike the petition for certiorari of OR et al. This Court should deny the motion.

A. Procedural defectiveness

The Motion to Strike the Petition is procedurally defective and therefore improper.

This Court's Rule 15.4 provides: "No motion by a respondent to dismiss a petition for certiorari will be received." Madsen et al., as respondents in No. 93-833,[4] see Rule 12.4, cannot circumvent this clear rule simply by using the word "strike" instead of "dismiss." Hence, this Court should reject the Motion to Strike outright. See generally R. Stern, E.

---

[4]Madsen et al. use the wrong caption and docket number -- No. 93-880, the number for their own separate petition -- on their Motion to Strike. Obviously this is an error, as Madsen et al. are actually seeking, as Rule 12.4 respondents, to strike the petition in No. 93-833.

Gressman, S. Shapiro, K. Geller, Supreme Court Practice 643-44 (7th ed. 1993).[5]

B. Substantive meritlessness

The Motion to Strike also fails for lack of merit.

The premise underlying the Motion to Strike of Madsen et al. (movants) is that OR et al. were not parties to this case in the court below (the Supreme Court of Florida). Yet movants themselves acknowledged, in their Petition for Writ of Certiorari, that OR et al. were parties in the state supreme court. See Pet. at ii (listing parties and including "Operation Rescue, Patrick Mahoney, Randall Terry, Bruce Cadle"), 7 n.5 (referring to OR et al. as "other parties in the Florida [supreme] court").

Movants nevertheless claim that because OR et al. filed a subsequent and separate appeal in the Florida Fifth District Court of Appeal, they could not have been parties either to the movants' original appeal or to the proceedings in the Supreme Court of Florida. But as explained supra § I, movants' premise is false. OR et al., like WHC et al. and Madsen et al., were parties to both appeals in the state district court of appeal as well as to the proceedings in the state supreme court. As parties adversely affected by the decision of the Supreme Court of Florida, OR et al. has every right to seek review of that decision in this Court.

[5]The Motion to Strike is also formally defective, not only because it has the wrong caption and docket number, see supra note 4, but because it is not printed, see Rule 21.2(b) ("any motion the granting of which would be dispositive of the entire case or would affect the final judgment to be entered . . . shall be printed in accordance with Rule 33 . . .").

III. Conclusion

For the foregoing reasons, this Court should deny the Motion to Strike.

Respectfully submitted,

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January 7, 1994

Supreme Court of Florida

THURSDAY, OCTOBER 28, 1993

OPERATION RESCUE, ET AL.

Petitioners,

vs. Case No. 81,908

WOMEN'S HEALTH CENTER, INC., ET AL.

Respondents.

* * * * * * * * * * * * *

Motion Of Certain Respondents/Appellants For Leave To File Supplemental Brief has been considered and is granted. The supplemental brief has been placed with the file.

A TRUE COPY

TEST:

Clerk Supreme Court.

bdm

c: Mr. John Tanner
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APPENDIX A

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No. 93-880

SUPREME COURT, U.S.
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In The

Supreme Court of the United States

October Term, 1993

JUDY MADSEN, ED MARTIN, and SHIRLEY HOBBS,

Petitioners,

v.

WOMEN'S HEALTH CENTER, INC., AWARE WOMAN CENTER FOR CHOICE, INC., EPOC CLINIC, INC., AND CENTRAL FLORIDA WOMEN'S HEALTH ORGANIZATION, INC.,

Respondents.

On Writ Of Certiorari To The Supreme Court Of Florida

JOINT APPENDIX
VOLUME I
PAGES 1-318

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EDITOR'S NOTE

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EIGHTEENTH JUDICIAL CIRCUIT
IN AND FOR SEMINOLE COUNTY, FLORIDA

DOCKET

Date	Description
10/25/91	Complaint filed by Women's Health Center
10/25/91	Motion for Temporary Restraining Order filed by Women's Health Center
12/06/91	Motion to Dissolve Temporary Restraining Order and Injunction by Operation Rescue America, Ed Martin, Judy Madsen and Shirley Hobbs
01/07/92	Motion for Permanent Injunction by Women's Health Center
07/30/92	Stipulated Facts by the Parties
10/02/92	Permanent Injunction by Judge Hall dated 9/30/92
10/27/92	Notice of Appeal
03/18/93	Notice of Hearing for 3/22/93 at 1:30 p.m.
03/19/93	March 1993 Motion Number 1: Emergency Motion for Sanctions Against Defendants Who Violated Court's Injunctive Order filed by Women's Health Center
03/22/93	Emergency Motion for Modification of Injunctive Order by Women's Health Center
03/31/93	Order on Appellees' Emergency Motion to Relinquish Jurisdiction is Granted for the Purpose of Seeking Additional Injunctive Relief by the 5th District Court of Appeals
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04/29/93	Directions to the Clerk
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05/28/93	Women's Health Center's Opposition to City of Melbourne's Motion to Intervene
06/21/93	Order Denying City of Melbourne's Motion to Intervene by Judge Rudd dated 6/15/93
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FIFTH DISTRICT

DOCKET

Date	Description
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04/26/93	Emergency Motion for Relief and Expedited Appeal
04/27/93	Joint Motion for Certification of Case to the Florida Supreme Court
04/27/93	Order Granting Emergency Motion
06/03/93	Transferred, Rule 9.125 certifying constitutionality

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SUPREME COURT OF FLORIDA

DOCKET

Date	Description
06/07/93	Certified Judgment from Trial Court with Miscellaneous 5th District Court of Appeals and Circuit Court Pleadings
06/07/93	Initial Brief on the Merits and Appendix
06/07/93	Answer Brief on the Merits and Appendix
06/07/93	Reply Brief on Merits and Appendix
08/31/93	Oral Argument
10/28/93	Trial Court's Order Imposing Amended Permanent Injunction
11/08/93	Emergency Motion to Require Enforcement of Injunctive Order
11/10/93	Response to Emergency Motions by City of Melbourne
11/22/93	Order Denying Emergency Motion to Require Enforcement of Injunctive Order
11/22/93	Mandate

IN THE CIRCUIT COURT OF THE EIGHTEENTH JUDICIAL CIRCUIT IN AND FOR SEMINOLE COUNTY, FLORIDA

WOMEN'S HEALTH CENTER, INC., AWARE WOMAN CENTER FOR CHOICE, INC., EPOC CLINIC, INC., and CENTRAL FLORIDA WOMEN'S HEALTH ORGANIZATION, INC.,

Petitioners,

v.

OPERATION RESCUE, OPERATION RESCUE AMERICA, OPERATION GOLIATH, Ed Martin, Bruce Cadle, Pat Mahoney, Randall Terry, Judy Madsen, and Shirley Hobbs,

Respondents.

Case No. 91-2811-CA

PERMANENT INJUNCTION

This cause came before the court upon the petition for permanent injunction and, based upon the arguments of counsel, the affidavits and the stipulation of the parties, the court finds:

Findings of Fact

1. Petitioners brought this action seeking a permanent injunction to protect the health, safety and rights of women in Brevard and Seminole County, Florida and surrounding counties seeking access to abortion, gynecological and other family planning services.

2. Respondents are individuals and organizations, acting in concert, who have planned a nationwide campaign, which they call "OPERATION RESCUE" (hereinafter, "OPERATION"), directed towards closing down abortion clinics and providers throughout the country. Respondents' own literature states that their intention is to "Physically close down abortion mills" by encircling them with thousands of protesters and blocking access to the facilities. Operation Goliath is dedicated to similar principles.

3. Petitioners are the owners of certain real property located in Brevard and Seminole County, Florida and other parts of Central Florida upon which businesses are run by petitioners which offer abortions along with birth control counselling to women.

4. Ed Martin, Pat Mahoney, Randall Terry, Judy Madsen and Shirley Hobbs are members of Operation Rescue and Operation Rescue America.

5. Ed Martin and Pat Mahoney have stated an intent to prevent persons from obtaining abortions in the Brevard and Seminole County area by blocking access to clinics.

6. Respondents have passed out flyers in the Central Florida area stating an intent to close down abortion clinics in this area.

7. Respondent, Pat Mahoney, was a leader in the Wichita, Kansas protests. Respondents, Ed Martin and Pat Mahoney, have made statements that there will be or may be a blocking of the entrance to an abortion clinic in the Central Florida area. Pat Mahoney and Ed Martin have

stated to members of the press that they intend to shut down a clinic, and have issued a press release which states that "the spirit of Wichita comes to Florida". The press release also contained information that the Reverend Ed Martin of Ocala announces an "Operation Rescue" for Central Florida.

8. Literature obtained from Rescue America states that their members should ignore the law of the State and the police officers who remove them from their blockading positions.

9. Respondents, OPERATION GOLIATH and its director, Bruce Cadle, disseminate written communication to various individuals throughout the country, some of whom reside in Seminole and Brevard County, which contains statements about closing down abortion clinics similar to those in the OPERATION RESCUE literature.

10. Petitioners and petitioners' patients and employees have no adequate remedy at law and will suffer irreparable harm if respondents are not enjoined from blocking or otherwise interfering with access to petitioners' clinics.

Conclusions of Law

1. An injunction is the appropriate remedy to prevent interference with petitioners' prospective business relationships with potential clients seeking access to abortion, gynecological, and other family planning services offered by petitioners. See *Drake v. Henson*, 448 So.2d 1205 (Fla. 3rd DCA 1984); *DeRitis v. Ahz Corporation*, 444 So.2d 93 (Fla. 4th DCA 1984). Respondents have

engaged and threatened to engage in continuing wrongs to petitioners' property interests and their business relationships and prevention of said interference is a proper basis for injunctive relief. See *Detolo v. Schouten*, 426 So.2d 1013 (Fla. 2nd DCA 1983); *Unistar Corporation v. Child*, 415 So.2d 733 (Fla. 3rd DCA 1982). Since respondents' interference and intended interference is clearly harmful conduct that results in irreparable harm, an injunction is appropriate. See *Sentry Insurance v. Dunn*, 411 So.2d 336 (Fla. 5th DCA 1982). Respondents activities have improperly resulted in an interruption of business activities and continuing damage to petitioners' business reputation.

2. The right of choice is strongly protected in Florida based upon the explicit language of Article I, Section 23 of the Florida Constitution. See *In re T.W.*, 551 So.2d 1186 (Fla. 1989). In addition to interfering with petitioners' prospective business relationships, respondents have sought to interfere with petitioners' patients right of choice which is protected under the Florida Constitution. Additionally, respondents activities have interfered with petitioners' employees right to work which is guaranteed under Article I, Section of the Florida Constitution.

3. Although respondents potential actions may be criminal in nature, they also constitute a recognized ground of equitable relief for which injunction is appropriate. See *Drake v. Henson, supra; DeRitis v. Ahz Corporation, supra*. While injunctive relief will generally not lie to restrain criminal activity unaccompanied by some recognized ground of equitable relief, the intervention of equity is warranted to protect civil or property interests where criminal prosecution is inadequate to effect this purpose. See *Syfo Water Company v. Chakoff*, 182 So.2d 17

(Fla. 3rd DCA 1965); *Davis v. Florida East Coast Railroad*, 166 So.2d 774 (Fla. 2nd DCA 1964). The criminal trespass statutes do not address the injuries which will occur to petitioners if respondents are not restrained from engaging in the activities which are sought to be enjoined.

Based upon the foregoing it is

ORDERED:

A. Respondents, OPERATION RESCUE, OPERATION RESCUE AMERICA, OPERATION GOLIATH, Ed Martin, Bruce Cadle, Pat Mahoney, Randall Terry, Judy Madsen, and Shirley Hobbs, are hereby enjoined from:

1) trespassing on, sitting in, blocking, impeding or obstructing ingress into or egress from any facility at which abortions are performed in Brevard and Seminole County, Florida;

2) physically abusing persons entering, leaving, working or using any services of any facility at which abortions are performed in Brevard and Seminole County, Florida; and,

3) attempting or directing others to take any of the actions described in Paragraphs 1 and 2 above.

B. Nothing in this Court's Order should be construed to limit Respondents' exercise of their legitimate First Amendment rights, such as, but not limited to, carrying signs, singing, and praying, in a manner which does not violate 1), 2), and 3) above;

C. This Court retains jurisdiction for determination of any costs to be imposed upon Respondents.

DONE AND ORDERED in Chambers at Sanford, Seminole County, Florida, this 30th day of September, A.D. 1992.

/s/ Wallace H. Hall
Wallace H. Hall, Circuit Judge

Copies furnished to:

Jerri A. Blair, Esq.
Christopher J. Weiss, Esq.
Patrick Mahoney
Bruce Cadle
Randall Terry

IN THE CIRCUIT COURT OF THE EIGHTEENTH JUDICIAL CIRCUIT IN AND FOR SEMINOLE COUNTY, FLORIDA

WOMEN'S HEALTH CENTER, INC., AWARE WOMAN CENTER FOR CHOICE, INC., EPOC CLINIC, INC., and CENTRAL FLORIDA WOMEN'S HEALTH ORGANIZATION, INC.,	)	CASE NO. 91-2811-CA
Plaintiffs,	)	
v.	)	
OPERATION RESCUE, OPERATION RESCUE AMERICA, OPERATION GOLIATH, Ed Martin, Bruce Cadle, Pat Mahoney, Randall Terry, Judy Madsen, and Shirley Hobbs,	)	
Defendants.	)	

MARCH 1993 MOTION NUMBER 2:
EMERGENCY MOTION FOR MODIFICATION OF INJUNCTIVE ORDER

The plaintiffs move the Court for modification of the Permanent Injunction entered by this Court on September 30, 1992 and, incorporating by reference the statements in the "March 1993 Motion Number 1: Motion for Sanctions Against Defendants Who Have Violated Court's Injunctive Order," the plaintiffs further state:

1. The harassment and intimidation directed against the plaintiffs and particularly against the clinic in

Melbourne, Florida, owned and operated by Aware Woman Center for Choice has increased in recent weeks and the threat of violence has been made more real by the fact that violent threats in Pensacola, Florida have escalated into murder of a physician there.

2. The techniques of harassment and intimidation have also become more sinister with the following activities coming into consistent use:

a. On numerous occasions, Aware Woman's driveway has been blocked, employees' cars have been vandalized and efforts have been made to cause the clinic to cease doing business. Copies of literature soliciting illegal activity by defendants and those acting in concert with them are attached to this motion as Exhibits 1,2 and 3. Operation Goliath, which has been described by defendants as "the biggest, meanest, most threatening and best armored champion of the Philistines" is an ongoing operation targeting Aware Woman. They have stated that they are "part of a specific strategy to put an end to abortion in our community." Defendants solicit others to act in concert with them by "join[ing] us every Wednesday and Saturday at Aware Woman . . . Center, to rescue those who are unjustly sentenced to death." Clearly, the stated intention of defendants is to interfere with Aware Woman's business relationships with its clients, to interfere in the medical relationship between physician and patient, and to invade the property and privacy rights of Aware Woman its employees and its patients. In addition to the above-described activities, there has been consistent harassment, intimidation, stalking, trespass and threats by defendants directed toward plaintiffs.

b. Operation Rescue has organized something it calls "IMPACT" standing for "Institute of Mobilized Prophetic Activated Christian Training" and "IMPACT Team" participants have appeared in the early mornings outside clinic staff homes. They ring the front doorbell, and when the door is answered by the staff member or family member, they are met with flashing cameras and video cameras of the defendants recording the incident. Defendants picket outside staff's homes and yell at staff inside. This conduct has occurred at two former staff members' homes and at least five current staff members' homes in the past two months. Anti-abortion literature is distributed in the neighborhoods and at homes of clinic workers; letters addressed personally to staff members and their neighbors have been left on doors of staff and neighbors' homes.

c. A large, black surveillance van outside the clinic hovers on the street during days when abortions are performed at the Aware Woman Clinic. This van has also been seen at two staff members' homes.

d. Defendants and their cohorts demonstrate outside the home of Patricia and Ted Windle, principals of Aware Woman, with the Windles' names on signs – including a sign that says Patricia Windle practices ritual child sacrifice.

e. The clinic's five phone lines, including an 800 number, are jammed with incoming calls from around the country. Some 5400 calls have flooded in on the 800 number within the last month. Patients are not able to get through on the phones. When the phones are answered, sometimes there is only silence, other times statements

are made, for example: "We represent America and if you don't stop killing babies you can get bombed." On the day Dr. Gunn was killed a phone call was received inside the Aware Woman Clinic: "One down, how many more will it take until you stop killing babies?" These tactics have interfered with the plaintiffs' business and have interfered with the communications between the clinic and those who seek its services.

f. The 13-year old son of a clinic staff person was lured into the car of an anti-abortion demonstrator and driven to a nearby fast food restaurant, where other anti-abortion demonstrators were waiting, and taunted with the statement that "he and his whole family would go to hell if his mother didn't stop killing babies." See affidavit of Lisa Merritt.

g. The 82-year old mother of a physician (Dr. Snydle, a physician who performs abortions at the clinic) received a call in the middle of the night that her son had been killed in an automobile accident.

h. An IMPACT TEAM member told clinic staff/ Clinic Defense Coordinator Ruth Arick: "I pray for your death in the name of Jesus."

i. Patients' and staff license plates have been traced through the Department of Motor Vehicles. Patients receive letters at home from the Women's Legal Action Coalition with accompanying documents urging legal action against the clinic. See attached Exhibits 4 and 5.

j. As patients arrive at the clinic and attempt to drive into the patient parking lot, their cars are slowed

and/or stopped by anti-abortion protesters blocking the driveway. The cars are then approached by "sidewalk counselors," material is shoved at the windows, and patients are yelled at "not to kill their baby," while protesters yell "mommy . . . mommy . . . daddy . . . daddy."

k. Shortly after Dr. Gunn was assassinated in Pensacola, on Wednesday, March 10, 1991, anti-abortion demonstrators outside the Melbourne clinic cheered at the news.

l. The clinic has received and continues to receive threatening letters in the mail.

m. Defendants have blockaded Dr. Monthree Raungsomboon in his home in Winter Park for two hours one day until he escaped through the yard of a neighbor. His son was followed onto a school bus.

n. Defendants picketed and harassed Dr. Snydle at a local hotel where he was staying the night before scheduled abortion procedures at the clinic.

3. Central to the *modus operandi* of Operation Rescue, the other defendants and those who act in concert with them, is the willingness and intent to violate valid city ordinances, state laws, and court orders in order to accomplish their unlawful objectives. Operation Rescue and the other defendants typically instruct other persons participating in their blockades to violate the law, including lawful court orders enjoining their illegal conduct. Operation Rescue, Rescue America and the other Defendants have called upon IMPACT Teams to descend upon Melbourne, Aware Woman Center, and other abortion clinics in the vicinity not simply to engage in pickets but

to implement "the threat of rescue" and other illegal actions. Defendants are not simply engaged in lawful protest, they are engaged in blockades, trespass, stalking and other illegal activities that have targeted Aware Woman, its patients and staff. Such activities have no First Amendment protection and, indeed, violate numerous local ordinances, state statutes and plaintiffs' constitutional and common law rights.

4. Upon information and belief, Defendants have engaged in multiple unlawful agreements. Defendants have also stated their public intention to act in furtherance of their conspiracy by:

a. engaging in illegal blockages and disruptions of certain clinics;

b. implementing the "threat of rescue;"

c. conducting targeted residential picketing of clinic owners and staff;

d. drawing "the battle lines and declaring an all out 'holy war' " on Aware Woman and clinics like it;

e. providing telephone numbers and registration data to marshall their forces for attack;

f. soliciting membership in IMPACT teams to make "house calls" and engage in other street activity;

g. jamming telephone lines;

h. soliciting others to "join them every Wednesday and Saturday at Aware Woman . . . Center to rescue those who are unjustly sentenced to Death!"

i. "obeying God's law" while in Florida, rather than the laws of the State and the United States.

5. Consistent with their economic motivations, defendants Operation Rescue National have charged their co-conspirators "registration fees" of $25.00 and a "commitment" fee of $50.00 per week for the duration of each conspirator's participation in the illegal activities of defendants and their IMPACT Teams. Defendants use mailings in which they solicit illegal activity to raise money to support their "personal needs." Copies of the forms by which defendants have "pre-registered" willing lawbreakers in Florida are attached to this petition as Exhibits 6 and 7.

6. Defendants' current and intended activities violate various Florida statutes and city ordinances. These violations have caused concern at the very top of Florida law enforcement. Gov. Lawton Chiles and Attorney-General Bob Butterworth have written jointly a letter to law enforcement officials. A copy of that letter is attached hereto as Exhibit 8 and made a part heresofar by reference. The conduct also intrudes into the plaintiffs rights of privacy, rights to maintain business relationships without malicious interference, rights not to be assaulted, stalked or harassed, right of reputation and right to work.

7. Operation Rescue and those acting in concert with it typically violate local and state laws as a part of their overall strategy. Defendant Terry emphasized earlier this year that "I will gladly break the law . . . " Defendant Rescue America has urged its followers to engage in conduct that will result in their arrest, and then to refuse

to cooperate with the instruction of law enforcement authority.

8. Operation Rescue, in its National Rescue Update, has indicated that "Holy Week rescues will take place this year in Central Florida" and it has invited its followers and co-conspirators to call the following phone number for further information: (407) 925-9557. Given their sheer numbers, and their willingness to violate the law and their calls for similar conduct by their sympathizers and supporters, there is a substantial threat that – absent intervention by this Court – the defendants will succeed in their efforts to overwhelm local law enforcement agencies and interfere with access to Aware Woman by its patients and staff.

9. Operation Rescue, and the other defendants who act in concert with them, have engaged in unlawful activities repeatedly in the past to effectuate "rescues." Not surprisingly, the courts of Florida, as well as those in New York, Pennsylvania, Washington, Oregon, Kansas, California, Maryland, Virginia, the District of Columbia and Texas have issued orders enjoining such illegal "rescues" and declaring Operation Rescue and those acting in concert with it to be involved in an unlawful conspiracy. Indeed, courts in Florida have issued injunctions against Operation Rescue in the Eighteenth and Ninth Judicial Circuits; a similar injunction imposing a protective perimeter around clinics and their patients was imposed by a court in Harris County, Texas against many of the parties involved in the activities in Brevard County.

10. In addition to establishing Plaintiffs' clear right to injunctive relief, the threats and activities of defendants also establish plaintiffs' entitlement to a protective order to prevent defendants from continuing their harassment of plaintiffs. Under the protective order, law enforcement should be empowered to:

a. place a trap on plaintiffs' telephone lines (at plaintiffs request) to obtain the telephone numbers of the persons engaged in telephone blockades and jamming of plaintiffs' phone lines;

b. arrest those who are stalking and harassing plaintiffs; and

c. assist the Court in enforcing its orders by means of civil contempt.

11. Finally, the actions of defendants constitute tortious interference with business relations, trespass, civil conspiracy and intentional infliction of emotional distress, assault, stalking, defamation and invasion of privacy. Accordingly, in addition to equitable relief, plaintiffs are each entitled to an award of compensatory damages from defendants. Furthermore, since the actions of defendants are willful and malicious, plaintiffs are entitled to an award of exemplary or punitive damages.

12. The activity by the defendants constitutes a clear threat to the substantial property and personal rights of the plaintiffs, the staff of the plaintiffs and the clients of the plaintiffs. The plaintiffs' rights are at immediate risk of irreparable injury if defendants are not restrained. Plaintiffs have no adequate remedy at law because, in the absence of injunctive orders of this Court,

defendants' unlawful conduct will continue to interfere with plaintiffs' constitutional statutory and common law rights. Accordingly, this Court should issue an amended Permanent Injunction and a Protective Order.

13. The relief that Plaintiffs seek is that already awarded by a court in Texas. A copy of that Injunction order has been provided to Court and Counsel. By means of an existing Temporary Injunction and Protective Order, the Courts of Texas have imposed a perimeter around the plaintiff clinics that created a buffer zone between the clinics and patients. Similar relief should be imposed between the homes of the individual plaintiffs and the defendants who target them in their homes. Accordingly, plaintiffs respectfully request that this Court enter the following orders and judgment as follows:

a. Modifying the Final Injunction entered in this case to provide additional clear statements relating to the conduct of the defendants and to provide a Protective Order;

b. Plaintiffs request that the Court restrain and enjoin the defendants, their officers, directors, agents and representatives, and all other persons – known or unknown – acting in their behalf or in concert with them, in any manner or by any means, from doing any of the following:

(1) Stalking plaintiffs, their patients, staff or employees as that term is defined in Florida Statutes Annotated Section 748.048.

(2) Trespassing on, sitting in, blocking, impeding or obstructing access to,

ingress into or egress from any part of any of the buildings in which the Planitiff [sic] clinics are operated, or at any of the addresses identified as the residence of plaintiffs, their staff or patients, including the entrances and exits to the buildings, the clinic parking lots, plaintiffs' driveways and residence parking lots.

(3) Congregating, picketing, patrolling or demonstrating within fifty (50) feet from the property line at which the Aware Woman or other Plaintiffs' facilities are located, including any parking lot or parking lot entrance, driveway or driveway entrance at any of the Plaintiffs' facilities;

(4) In addition to the 50 feet restriction set forth above, demonstrating on the sidewalks (or in the street) or engaging in other conduct within fifty (50) feet in any direction (or such other distance as the court may deem appropriate) from any building in which the Plaintiffs' facilities are operated, or at any of the addresses listed above, or in any way obstructing or interfering with pedestrian or vehicle traffic within such areas;

(5) Demonstrating within thirty (30) feet of any person seeking access to or leaving either the Plaintiff Clinics, or any of the addresses listed above, or the parking lots for the clinic or the driveways and parking lots of the homes of its owners, staff or patients of the clinic, or in any way impeding such person's access to

the clinic or entrance to or exit from the clinic, its parking lots or the homes.

(6) Physically abusing, grabbing, intimidating, harassing, touching, pushing, shoving, crowding or assaulting persons entering or leaving, working at or using services at the Plaintiff Clinics or trying to gain access to, or leave, any of the homes of owners, staff or patients of the clinic.

(7) Harassing, intimidating or physically abusing, assaulting or threatening any present, former or potential doctor, health care professional, or other staff member, employee or volunteer who assists in the provision of services at the Plaintiff Clinics.

(8) Congregating, picketing, patrolling or demonstrating within five hundred (500) feet of the residence of any of Plaintiffs' employees, staff, owners or agents, or using bullhorns or other sound amplification devices within twenty-five hundred (2500) feet of the residence of any of Plaintiffs' present, former or potential employees, physicians, health care providers, staff, owners or agents, or blocking or attempting to block, barricade or in any other manner obstruct the entrances, exits or driveways of the residences of Plaintiffs' present, former or potential employees, physicians, health care providers, staff, owners or agents and prohibiting defendants from inhibiting, impeding or attempting to impede the

free ingress and egress of persons to any street that provides the sole access to the street on which the residences are located.

(9) Attempting to take, or in any manner inducing, encouraging, directing, aiding or abetting others to take, any of the actions described in subparagraphs (a) through (g) above.

14. Plaintiffs do not seek and nothing in the Court's Order should state, or be construed to state, that Defendants and those acting in concert with them are limited, in any way, from lawfully exercising their First Amendment rights subject to these narrow and permissible time, place and manner restrictions on the manner in which such rights are exercised.

15. Plaintiffs also request that the Court's order contain provisions:

a. Ordering a trap on the telephone lines of the Aware Woman Center in order to identify those persons engaged in a phone blockade and jamming of the Clinic's phone lines;

b. Authorizing law enforcement authorities, pursuant to the protective provisions of the Court's order, to arrest those persons who are in violation of the injunction so that they may be held in contempt;

c. Authorizing clinic patients, owners and staff to conceal the license plate numbers on their cars so as to thwart the stalking;

d. Directing defendants to provide to the local law enforcement authorities, and to this Court, advance

notice of the location and time of any demonstration or other protest activity planned against the plaintiffs or any of the plaintiffs' residences, such notice to be provided at least 24 hours in advance of any such demonstration or activity;

e. Authorizing plaintiffs to mark, with spray paint or other identifiable markers, the perimeter of the injunction awarded by this Court so that enforcement of the injunction will be easier for both plaintiffs and defendants;

f. Authorizing the plaintiffs to put a sign giving notice of this Court's injunction orders and to use a loud speaker system or "bull horn" to inform demonstrators of the terms of injunction orders;

g. Stating that failure to comply with the Court's Order by any defendant or anyone acting in their behalf or in concert with them in any manner, after such notice, shall subject each person or entity to contempt fines, and to incarceration until the contemnor states that he or she will obey the lawful orders of this Court; and

h. Granting such other and further relief as the Court deems appropriate.

Plaintiffs also request that, upon final trial, they be awarded a permanent injunction and protective order identical in form and substance to that set out above,

together with actual and punitive damages, and their attorneys' fees and costs.

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COUNSEL FOR PLAINTIFFS

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by US or hand Mail to Christopher J. Weiss, Two South Orange Avenue, Orlando, Florida 32802, Sheila Rae Eschenberg, 221 Avenida De Paz, Indiatlantic, Florida 32903, Bruce Cadle, 701 Andrew Street, N.E., Palm Bay, Florida 32905, Patrick Mahoney, 1345 N.E. Fourth Court, Boca Raton, Florida 33432, and Randall Terry, RR 2, Box 196, Harpursville, New York 13787-9536, on this 22nd day of March, 1993.

/s/ Talbot D'Alemberte

Introducing The Next Phase Of The
Pro-Life Movement . . .

OPERATION GOLIATH

"Goliath" means the biggest, meanest, most threatening and best armored champion of the Philistines. When Goliath falls, the rest run.

For the battle is the Lord's, and He will deliver Goliath into our hands! (I Samuel: 17)

*** THERE IS NOT ROOM IN BREVARD COUNTY FOR CHILD KILLING AND THE CHURCH TO CO-EXIST.**

*** THEREFORE WE ARE DRAWING THE BATTLE LINES AND DECLARING AN ALL OUT "HOLY WAR".**

*** WE WILL BEGIN BY CALLING THE CHURCH AND THE COMMUNITY TO REPENT, AND TO BEGIN TO STAND UP FOR THE CHILDREN.**

*** WE WILL PRAYERFULLY, PEACEFULLY, NON-VIOLENTLY BEGIN TO PERSISTENTLY CONFRONT THE ABORTIONISTS, THE OWNERS, OPERATORS, AND EMPLOYEES OF AWARE WOMAN CHILD KILLING CENTER, BY PICKETING, RESCUE MISSIONS, STREET PREACHING, LITERATURE DIST., SIDEWALK COUNSELING, AND LAWSUITS TO ENCOURAGE THEM TO QUIT KILLING CHILDREN!**

*** WE WILL, AS ALWAYS, REACH OUT TO THE MOTHERS CRISIS PREGNANCIES, WITH THE LOVE OF CHRIST, OFFERING THEM HELP AND ALTERNATIVES.**

*** WE WILL CONTINUE UNTIL CHILDREN ARE SAFE FROM DEATH IN OUR COMMUNITY.**

*** THE GOAL OF OPERATION GOLIATH IS TO REMOVE CHILD KILLING FROM AMERICA, ONE TOWN AT A TIME.**

IF YOU BELIEVE ABORTION IS MURDER, THEN ACT LIKE IT. JOIN US AND THE KILLING WILL STOP!
(407) 723-4094

ATTENTION RESIDENTS OF BREVARD COUNTY!!! 20,000 innocent babies have been murdered through abortion in OUR COMMUNITY. THEIR INNOCENT BLOOD THAT HAS BEEN SHED POLLUTES OUR LAND!

Proverbs 6	Teaches that God hates the shedding of innocent blood, and that it is an abomination to Him.
Deuteronomy 21	Teaches that you don't have to shed innocent blood to be guilty of it, if you know innocent blood is being shed and you don't do anything, then you are guilty!
Leviticus 20	Teaches that if someone is sacrificing their children, the community is responsible to deal with that person.
Isaiah 1:15	Says that God won't even listen to our prayers because our hands are covered with blood!

WHAT CAN WE DO?

Isaiah 1:17	Tells us to seek justice and defend the fatherless!

Psalm 82:3&4	Tells us to defend the cause of the weak and fatherless, and to rescue the weak and needy, and deliver them from the hand of the wicked!
Proverbs 24:11	Tells us to rescue those who are unjustly sentenced to death, don't stand back and let them die!
Proverbs 31:8	Tells us to speak up for those who cannot speak up for themselves.
James 1:27	Tells us that pure religion in the sight of our God is to defend and take care of orphans in their distress.

Who is more of an orphan than a baby whose parents are giving it over to death?

This is not just a political, social, or personal cause, this is a matter of LIFE AND DEATH !!!

JOIN US EVERY WEDNESDAY AND SATURDAY AT AWARE WOMAN CHILD KILLING CENTER, TO RESCUE THOSE WHO ARE UNJUSTLY SENTENCED TO DEATH!

OPERATION GOLIATH
P.O. Box 100037
Palm Bay, FL 32910-0037

Are you Pro-Life but you're not sure what to do about it

Introducing the next phase of the Pro-Life movement . . .

OPERATION GOLIATH

When your children and grandchildren ask what you did when they were killing babies in America, what will you be able to say?

Come find out how you can be a part of a specific strategy to **put an end to abortion in our community.**

Monday, Jan. 21st, 7 pm New Life Church 1905 Westwood Blvd.

(Westwood Blvd. runs north off of New Haven, east of Dairy Rd. in Melbourne)

BREVARD COUNTY ISN'T BIG ENOUGH FOR CHILD KILLING AND THE CHURCH TO CO-EXIST

Prayer Vigil For The Unborn
Tuesday, Jan. 22nd, 8 am - 8 pm
AWARE WOMAN ABORTUARY
Join us on the 18th anniversary of the legalization of child killing in America, as we ask God to intervene in America's holocaust.

Sponsored by:
OPERATION GOLIATH
723-4094

WLAC ***Women's Legal Action Coalition***
P. O. Box 362384
Melbourne, FL 32936-2384

March 1, 1993

Karolyn Nichols
310 SEABREEZE DR
INDIALANTIC FL 32903-3013

Dear Karolyn,

Your vehicle was seen at the Aware Woman Clinic in Melbourne, Florida on December 23, 1992, a day when abortions were being performed. We are a group of concerned citizens organized specifically to help women having problems after an abortion. If you or your loved one are hurting after an abortion, please let us help. Many women have been damaged either physically or emotionally or both by abortion at the Aware Woman Clinic.

The following symptoms may indicate abortion related damage:

1. Heavy or continued bleeding
2. Severe cramping
3. Elevated temperature
4. Intense headaches
5. Depression, suicidal tendencies
6. Hallucinations, nightmares, etc.
7. Inability to get pregnant again
8. Inability to carry a baby to term, miscarriage, or premature birth

We have doctors here in Melbourne who can help with these problems. The Aware Woman Clinic's doctors come

from at least 60 miles away. Their doctors are there only on abortion days, usually Wednesday and Saturday. The people there on other days are not doctors, they are nurse practitioners or physician assistants. If you are hurting, see a doctor not a nurse or a practitioner.

If you have been hurt and don't feel comfortable calling us, please send in the enclosed Department of Professional Regulation (DPR) Uniform Complaint Form. The DPR will keep your complaint completely confidential. Many women who are hurt do not complain. If you do not complain, the DPR will not know that there is a problem and women will continue to be hurt. Please call the DPR at 1-904-488-6602 with any questions on filling out this form.

Sincerely yours,

Meredith Raney
(Phone 407-242-6925)

[SEAL]

DEPARTMENT OF PROFESSIONAL REGULATION

Lawton Chiles
Governor
George Stuart
Secretary

AUTHORIZATION FOR RELEASE OF PATIENT INFORMATION

TO: Any and all treating physicians or facilities

This document authorizes any and all licensed health care practitioners, including but not limited to: physicians, nurses, therapists, social workers, counselors, dentists, chiropractors, veterinarians, podiatrists, optometrists, hospitals, clinics, laboratories, medical attendants and other persons who have participated in providing any care or service to me, to discuss any communication, whether confidential or privileged, and to provide full and complete patient reports and records justifying the course of treatment including but not limited to: patient histories, x-rays, examination and test results, reports or information prepared by other persons that may be in your possession and all financial records, to the Florida Department of Professional Regulation (or any official representative of the Department) pursuant to Section 455.241, Florida Statutes.

This document authorizes the loan of any of the aforementioned reports and information to the Department of Professional Regulation (or any official representative of the Department) for reproduction, investigation or other use.

A photocopy of this document is as sufficient as the original.

_____ _____ _____ _____
Patient Signature D.O.B. Social Sec. No. DATE

_____ _____
Authorized Person Other Than Patient — Relationship

Sworn to and subscribed to before me this ___ day of _____, 19___

_____
NOTARY PUBLIC

My commission expires: _____

_____
Witness Signature
(if not notarized)

FOR OFFICIAL USE ONLY
OFFICE _____ ID NO. ___

DPR/REG FORM 390 0392

_____

[LOGO]

DEPARTMENT OF PROFESSIONAL REGULATION

UNIFORM COMPLAINT FORM

Please return to: DPR Consumer Complaints
Northwood Centre,
1940 N. Monroe Street
Tallahassee, FL 32399-0782

Ph. (904) 488-6602

Type or Print	*Contact (other than yourself)*
Your Name: _____	Name: _____
Address: _____	Address: _____
_____	_____
_____ (Zip)	_____ (Zip)
Telephone ( ) _____ Business	Telephone( ) _____
( ) _____ Residence	
Your Occupation: _____	

SUBJECT OF COMPLAINT

Name: _____
Person and/or Company

Address: _____

_____

City: _____

ZIP: _____

_____

Telephone ( ) _____

Occupation: _____

State: _____

License # (if known): _____

Have you contacted subject concerning complaint?

[ ] Yes [ ] No Date: _____

Private Attorney

(if applicable) _____
Name Address

( ) _____
Telephone City State Zip

Witnesses (Please give full name and addresss [sic])

_____

_____

_____

_____

_____

Please see other side

DPR/REG 001 (Rev. 09/90)

WLAC Women's Legal Action Coalition
P.O. Box 362384
Melbourne, FL 32936-2384

March 1, 1993

Judy Boyce
4522 RIVERMIST DR
MELBOURNE FL 32935-0000

Dear Judy,

Your vehicle was seen at the Aware Woman Clinic in Melbourne, Florida on January 30, 1993, a day when abortions were being performed. We are a group of concerned citizens organized specifically to help women having problems after an abortion. If you or your loved one are hurting after an abortion, please let us help. Many women have been damaged either physically or emotionally or both by abortion at the Aware Woman Clinic.

The following symptoms may indicate abortion related damage:

1. Heavy or continued bleeding
2. Severe cramping
3. Elevated temperature
4. Intense headaches
5. Depression, suicidal tendencies
6. Hallucinations, nightmares, etc.
7. Inability to get pregnant again
8. Inability to carry a baby to term, miscarriage, or premature birth

We have doctors here in Melbourne who can help with these problems. The Aware Woman Clinic's doctors come from at least 60 miles away. Their doctors are there only on abortion days, usually Wednesday and Saturday. The

people there on other days are not doctors, they are nurse practitioners or physician assistants. If you are hurting, see a doctor not a nurse or a practitioner.

If you have been hurt and don't feel comfortable calling us, please send in the enclosed Department of Professional Regulation (DPR) Uniform Complaint Form. The DPR will keep your complaint completely confidential. Many women who are hurt do not complain. If you do not complain, the DPR will not know that there is a problem and women will continue to be hurt. Please call the DPR at 1-904-488-6602 with any questions on filling out this form.

Sincerely yours,

/s/ Meredith Raney
Meredith Raney
(Phone 407-242-6925)

Dear Brothers and Sisters in Christ:

As some of you may know, I have taken a step into full-time pro-life ministry! I have felt for a long time, that someone should be dedicated full-time in leading this battle in our community and God has led me to be the one. In preparation for this step, I have attended national pro-life leadership conferences in New York, Washington D.C., Atlanta, Houston, and Chicago.

I am currently serving as director of *PRO-LIFE ACTION MINISTRIES* director of OPERATION GOLIATH, and a board member of Shepherding Home

Ministries. My activities basically involve overseeing a variety of pro-life activities, such as sidewalk counseling, picketing, rescues, and special events such as rallies, life-chains. . . .

We are in highly pivotal times. I believe we will either win or lose this battle for life, depending on how we respond now. Scripture teaches that even though God's people abandoned His commands, and even though they shed innocent blood which polluted their land, that because of God's great lovingkindness, when a remnant of His people cried out, repented, and sought His face, He delivered them! If we want to see God heal our land, we must turn from our wicked ways (apathy, materialism, selfcenteredness) and pray for God to have mercy on us.

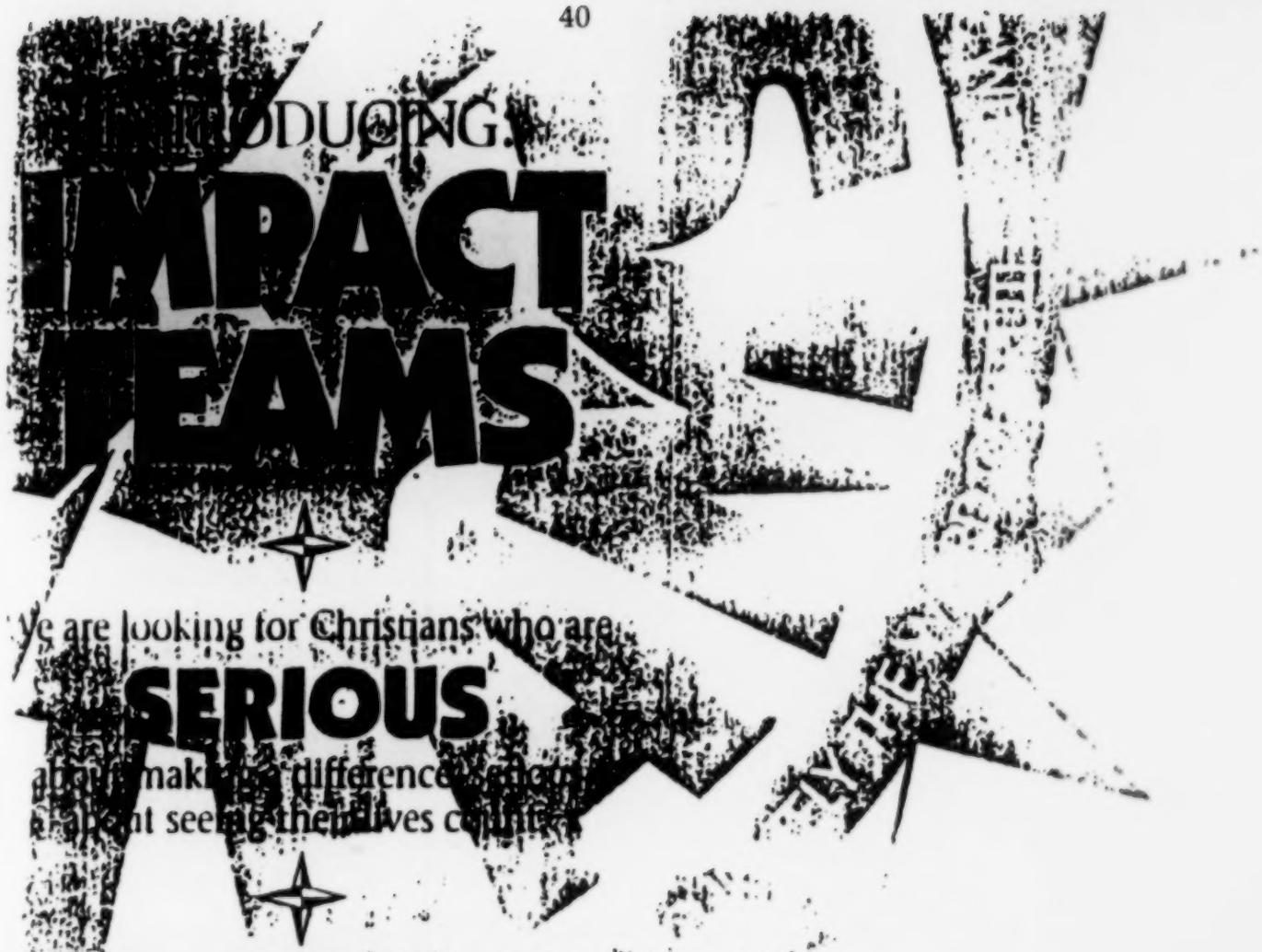
Most people don't think of someone being a missionary in their own community, but that's really what I'm doing, being a missionary to the pre-born. 20,000 babies have died through abortion in Brevard County, and over 1,000 per year are still being murdered. I want to see our community completely rid of childkilling!

I need your help. I need to raise all of my support for this work. I have already raised 1/3 of our monthly support from my church, (Covenant Presbyterian). I need to raise the rest of my support from you, our pro-life brothers and sisters in the Lord. *Can you help us today?* We need immediate help to be able to serve in this ministry. I know times are tough, but even if each of you could help with just a small monthly gift, our needs could be met. No amount is too small, and no amount is too large either. Any amounts above our personal needs will go

straight to the ministry needs. Your support for us will not only affect our area, but our state and nation as well as I am working to assist other groups around Florida, and I am working with national leaders as well.

Whether you can help us financially or not, PLEASE PRAY FOR US ON A REGULAR BASIS! Without your prayers we will not survive.

In His Service,
/s/ Bruce Cadle
Bruce Cadle


INTRODUCING:
IMPACT
TEAMS

We are looking for Christians who are

SERIOUS

about making a difference, serious about seeing their lives count.

We are looking for Christians with an

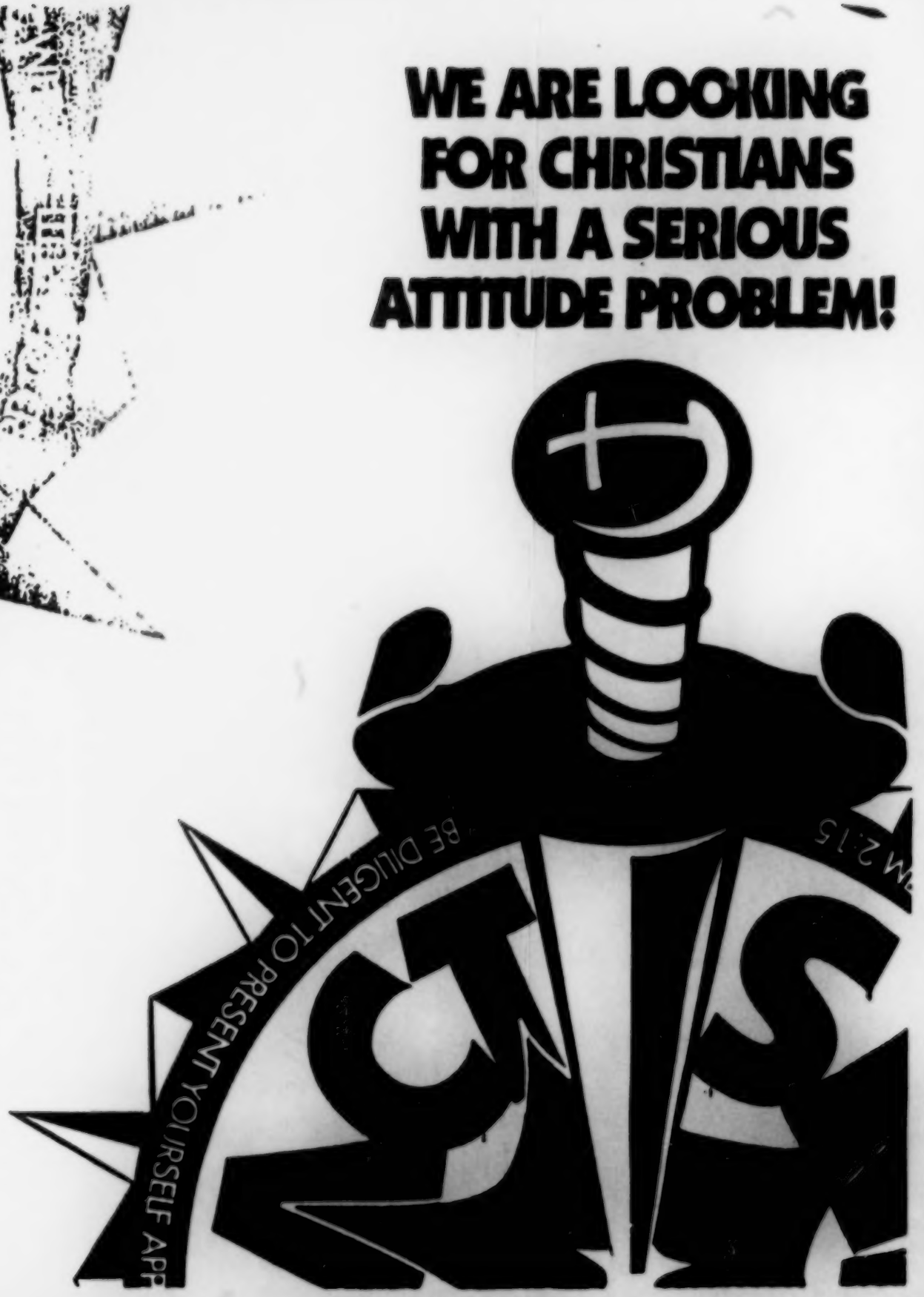
ATTITUDE

of righteousness, an attitude of victory, and an attitude of team work.

We are looking for Christians who want to be a

PROBLEM

to the kingdom of darkness and the liberal pro-death agenda.



IMPACT Teams stands for: *I*nstitute of *M*obilized *P*rophetic *A*ctivated *C*hristian *T*raining. They will be a powerful weapon in our battle against the powers of darkness as well as a life-changing experience for those who participate.

If you are serious about developing your Christian character so you can be equipped to fulfill God's purpose for your life, if you are willing to be a team player, to share your life and talents for this and the next generation, then you should consider being a part of IMPACT Teams.

Each IMPACT Team will be an outreach of Operation Rescue [illegible] in conjunction with the lo[illegible]national [illegible] help equip, train and lead these groups into true spiritual warfare.

Each IMPACT Team will be selected to bring together a complimentary team that will function as a [illegible]

Each IMPACT Team will [illegible] vision to serve [illegible] groundwork [illegible]

Each IMPACT Team will [illegible] academics [illegible] ministry so that it can continue to advance [illegible] missionaries [illegible]

Can you imagine being part of a team that will give witness to Jesus Christ every day? One day you may make a house call, one day be sidewalk counselling, and, of course, the threat of rescue will hang over the killers' heads every day, because you will be there. In between street activities you will learn from key Christian leaders who have been used of God in various way to impact our nation. This is like a Bible school with wheels, not only a place to learn and grow as a Christian, but to *do*!

HOW DO YOU JOIN AN IMPACT TEAM?

Tear off the attached application and return it to us along with a $25 registration fee. After we receive your initial information and it is screened you will receive a more detailed application. You will then be notified of opportunities to join an IMPACT Team.

WHO ARE IMPACT TEAMS AVAILABLE TO?

Teens from the age of 16 up to those young in spirit. Both singles and families will be able to participate.

WHAT IS THE COST?

You will be responsible for your transportation to and from the location and any other personal items or existing personal financial obligations. Each teammate will augment their housing and food cost by committing $50.00 per week for the 12-week period.

HOW LONG DOES AN IMPACT TEAM LAST?

Each IMPACT Team commits for 12 weeks, which includes [illegible] training and ministry equipping.

TRAINING A NEW GENERATION OF LEADERS!

PRELIMINARY APPLICATION

YES! I am interested in joining an IMPACT Team!

☐ IMPACT Team #1:
January 18 - April 9
Central Florida

☐ IMPACT Team #2
June 14 - September 3
Location to be announced

First Name: _____

Last Name: _____

Address: _____

City: _____

State: _____ ZIP: _____

Phone: _____

Marital Status _____ Age: _____

Occupation: _____

Please Return this completed form to:

OPERATION RESCUE NATIONAL
P.O. Box 127, Summerville, SC 29484
(803) 821-8441

OPERATION Rescue NATIONAL

The plans for the Republican Convention in Houston are in full swing. Operation G.O.P. (Guard Our Pre-born) will be held August 11-21. Many pro-life activities, including rescue, will be held. CAN YOU COME? Please contact (714) 761-5117 for further information. Don't miss this opportunity to be a prophetic witness to our nation.

As the pro-life forces grow, we are facing a *serious* need for fresh and better trained leadership. For this purpose, Operation Rescue National is announcing the first IMPACT (Institute of Mobilized Prophetic Activated Christian Training) Team to be held in Florida. January, 1993. The second team will be sent to a midwestern city in the Summer of 1993.

If the rescue movement does not have a *plan to win,* it is *planning to lose.* The IMPACT team concept is the most aggressive plan ORN has ever undertaken. Pro-life leaders from around the country will take 100 people in two groups of 50, to train them to be a part of a whole new generation of leaders – people who not only understand the battle, but are equipped to win it. They must be willing to commit for 12 weeks to get the training needed to be a prophetic leader.

As you can imagine, the cost of undertaking something of this magnitude will be extraordinary by our standards, but the cost of not doing it in terms of human life would be unbearable. There is no choice – leaders must be trained for the fierce battles that lie ahead of them. Housing, feeding and training people will be an incredible challenge, but there is not a better investment that we could make. We are counting on you to help. The estimated cost per person will be about $150.00 per week.

Each future leader will pay $50.00 of that cost. That leaves $100.00 per person per week that needs to be made up. The people who come to this training will be giving up jobs and homes to get trained for the battle. I am asking you to adopt them as missionaries and ambassadors of life and liberty.

The goal, is to turn the Summer of Purpose into a lifetime – a lifetime for the thousands of children that are scheduled to die each day in our nation and *a lifetime of purpose* for the Christians and the sleeping Church. Please seize this opportunity to train up the next generation of leaders!

In the Master's Service,

/s/ Keith
Rev. Keith Tucci
Executive Director
Operation Rescue National

P.S. There are various needs that the IMPACT Teams have. If you can help with any of these, please contact 803-821-8441. We need a motor home, several buses, several vans, and several cars. We are also in need of all types of office equipment: computers, printers, telephones, adding machines, typewriters, copier, shredders, refrigerator, microwave and various other items.

[SEAL] LAWTON CHILES
GOVERNOR

STATE OF FLORIDA

Office of the Governor

THE CAPITOL

TALLAHASSEE, FLORIDA 32399-0001

March 12, 1993

The Honorable Scott Lancaster
Sheriff, Clay County
Post Office Box 548
Green Cove Springs, Florida 32043

Dear Sheriff Lancaster:

The recent homicide of a physician in Pensacola will likely heighten tensions surrounding protests directed at abortion clinics. Regardless of how any individual may feel about this most divisive of social issues, violence must be condemned and prevented. This is not an acceptable method for dispute resolution.

Florida must recognize First Amendment rights for free speech and assembly, but we must also protect the rights of people to use legal medical facilities.

In the days and weeks ahead, your deputies and officers may be called upon to respond to potentially volatile situations. For this reason, we would like to note some of the statutes that may be of use in addressing these situations:

Section 836.05 – Threats; extortion.

It is a second degree felony to maliciously threaten an injury to a person, property or reputation of another

person by means of written or printed communication. Where individuals have received hate mail or had their public property vandalized by means of graffiti spelling out threatening messages the statute may be useful.

Section 836.10 – Written threats to kill or do bodily injury; punishment.

This statute provides that it is a felony of the second degree to write or compose and send or direct the sending of a threatening communication to another person.

Section 838.021 – Corruption by threat against public servant.

Any person who threatens to unlawfully harm a public servant or their family member or other person in whose welfare the public servant is interested is guilty of a felony of the third degree. If the person actually harms the public servant or another person, the felony becomes one of the second degree. This provision may be useful if undue influence is utilized against any public officer or employee of government, whether they are elected or appointed to office, including but not limited to judges, county commissioners, or members of the Executive Branch if such activity is undertaken in an effort to frustrate or influence the performance of a public duty. In situations whereby health inspectors are seeking to inspect clinics and are subject to harms or threats to themselves or to their families this provision would be applicable.

Chapter 843 – Obstructing justice.

This includes the offenses of resisting an officer with violence to his person and resisting an officer without

violence to his person. These provisions are self-explanatory.

Chapter 784 – Assault and battery, culpable negligence.

Obviously, intentional unlawful threats by word or act to do violence to the person of another coupled with an apparent ability to do so followed by some act which creates a well-founded fear in another person constitutes a second degree misdemeanor under Section 784.011. If an assault is committed with a deadly weapon, the penalty is raised to a felony in the third degree. Section 784.03 and 784.045 cover instances of battery or aggravated battery. Perhaps not as well-known is a fairly recent enactment of the Legislature, Section 784.06 which includes the ability of a victim of repeat violence to obtain a protective injunction and outlines the powers and duties of the court. While this section is directed towards repeat acts of domestic violence, it does contain language outlined in subsection 2(a) allowing *any person* who has been victimized repeatedly to proceed to circuit court, file a sworn petition and obtain an injunction.

Chapter 806 – Arson and criminal mischief.

Given the unfortunate prior incident of fire bombing in the Pensacola area and other acts of violent acts against property, your officers should be made aware of the provisions of Chapter 806 regarding arson, criminal mischief, fire bombs and the prevention or obstruction of extinguishment of a fire. The range of penalties outlined under Chapter 806 span from misdemeanor to felonies of the second degree.

Chapter 810 – Burglary and trespass.

Your officers will commonly be confronted by individuals who willfully trespass upon private property. While trespassing is generally a misdemeanor offense, it is a felony of the third degree if the trespasser is armed with a firearm or other dangerous weapon during the commission of the offense.

Section 837.05 – False reports to law enforcement authorities.

This provision makes it a first degree misdemeanor to knowingly give false information to any law enforcement officer concerning the alleged commission of any crime. Should officers be involved in attempting to sort out participants in a maylay [sic] and be misled by potential witnesses or other parties to the dispute, this would be an available mechanism to assist law enforcement.

Section 784.048, F.S. 1992 – Stalking.

This relatively new provision to Florida law provides a variety of punishments that can be imposed against individuals who harm others by engaging in a course of conduct that causes substantial emotional distress in the person targeted for no legitimate purpose and also creates a felony of the third degree for any person to willfully, maliciously and repeatedly harass another person and make a credible threat with the intent to place the victim in reasonable fear of death or bodily injury. Additionally, if an injunction has been obtained as outlined in Section 784.046, as discussed above, or after any other court-imposed prohibition of conduct towards a subject

person or persons or that person's property, there continues a course of conduct which includes knowing, willfull, malicious and repeated harassment of another person. There is a violation of the offense of aggravated stalking which is a third degree felony. Lastly, and significantly, subsection (5) of this law provides "any law enforcement officer may arrest, without a warrant, any person he or she has probable cause to believe has violated the provisions of this section." NOTE: Section 748.048(1)(a), (b) (2) and (5) have been declared unconstitutional in Broward County.

The Florida Department of Law Enforcement and the Office of the Attorney General are available to assist you with training and providing expertise in how to appropriately apply these statutes to unlawful acts regarding the clinics, their staffs and members of the public visiting them. You may contact FDLE Commissioner Tim Moore for further information on these training opportunities.

We pledge the full support of the Office of the Governor and the Office of the Attorney General in assisting you in your duties in regard to these problems. It is our expectation that those of you on the front line of law enforcement will rise to the challenges which surround the abortion issue and that your efforts to maintain the peace can be accomplished without risking harm to your officers and deputies and private citizens.

Sincerely,

/s/ Lawton Chiles
Lawton Chiles
Governor

/s/ Robert A. Butterworth
Robert A. Butterworth
Attorney General

LC/RAB/dmn

IN THE CIRCUIT COURT
OF THE EIGHTEENTH JUDICIAL CIRCUIT
IN AND FOR SEMINOLE COUNTY, FLORIDA

CASE NO.: 91-2811-CA-16-K

WOMEN'S HEALTH CENTER, INC., AWARE WOMAN CENTER FOR CHOICE, INC., ET AL.,

Petitioners,

vs.

OPERATION RESCUE, OPERATION RESCUE AMERICA, OPERATION GOLIATH, ED MARTIN, BRUCE CADLE, SHIRLEY HOBBS, JUDY MADSEN, ET AL.,

Respondents.

_____/

AMENDED PERMANENT INJUNCTION

THIS CAUSE came before the court for hearing on the motion of petitioners for sanctions and modification of the permanent injunction entered by this court, (The Honorable Wallace H. Hall), dated September 30, 1992, and the court having taken three days of testimony and having carefully considered the evidence and the legal arguments makes the following findings:

A. That despite the injunction of September 30, 1992, there has been interference with ingress to the petitioners' facility known as the Aware Woman Clinic located on the northwest corner of U.S. Highway One and Dixie Way in the City of Melbourne, Brevard County, Florida. The interference to ingress has taken the form of

persons on the paved portions of Dixie Way, some standing without any obvious relationship to others; some moving about, again without any obvious relationship to others; some holding signs, some not; some approaching, apparently trying to communicate with the occupants of motor vehicles moving on the paved surface; some marching in a circular picket line that traversed the entrance driveways to the two parking lots of the petitioners and the short section of sidewalk joining the two parking lots and then entering the paved portion of the north lane of Dixie Way and returning in the opposite direction. (See drawing attached.) Other persons would be standing, kneeling and sitting on the unpaved shoulders of the public right-of-way. As vehicular traffic approached the area it would, in response to the congestion, slow down. If the destination of such traffic was either of the two parking lots of the petitioners, such traffic slowed even more, sometimes having to momentarily hesitate or stop until persons in the driveway moved out of the way.

B. The number of people on any one day would vary from a handful to a crowd of four hundred. The composition of the crowd would include some of the named respondents in this cause; some persons who were loosely associated with the respondents' organizations, Operation Rescue and Operation Goliath; some who were present in support of the clinic (pro-choice); some law enforcement officers engaging in crowd and traffic control (from five officers on light days to as many as fifty officers on other days); and some representatives of the print and television media. The frequency with which persons would appear at this location would range from

once a week to three times a week with the largest gatherings usually on Saturdays.

C. Associated with such gatherings would be noise emanating from singing, chanting, whistling, loudspeakers on the exterior of the clinic broadcasting music, individual portable radios (boom boxes), and occasional bullhorns. Individuals of the partisan groups would shout and yell at each other, frequently approaching so closely as to be in each other's face trying to out-sound the other, occasionally using boom boxes at full volume as an assist.

D. The Melbourne Police Department officers on the scene on some occasions erected temporary barricades (saw horse type) in an effort to put some distance between the partisan groups. The respondents and those aligned with them, remained primarily in the public right of way (paved and unpaved). The pro choice people would be on the edge of the clinic's lawn and parking lot (private property) but occasionally attempting to share the sidewalk with the opposition. On at least one occasion in order to give more room for people, the police barricaded the north lane of Dixie Way so that two-way vehicular traffic was confined to the single south lane.

E. As traffic slowed on Dixie Way and began its turn into the clinic's driveway, the vehicle would be approached by persons designated by the respondents as sidewalk counselors attempting to get the attention of the vehicles' occupants to give them anti-abortion literature and to urge them not to use the clinic's services. Such so-called sidewalk counselors were assisted in accomplishing their approach to the vehicle by the hesitation or

momentary stopping caused by the time needed for the picket line to open up before the vehicle could enter the parking lot.

F. The clinic has fences on its west and north side, and persons would occasionally place a ladder on the outside of the fence and position themselves at an elevation above the fence and attempt to communicate by shouting at persons (staff and patients) entering the clinic. On one occasion the communication to a clinic staff person took the form of an attempt to invoke the wrath of God by shouting, "I pray that God strikes you dead now!"

G. On other occasions since the entry of the injunction on September 30, 1992, the respondent, Cadle, and others in concert with him approached the private residences or temporary lodging places of clinic employees. These approaches included not only direct communication with the occupants (sometimes the "home alone", minor children of the occupants), but also carrying signs, walking up and down on the sidewalk or street in front of the residence, shouting at passers-by, contacting (ringing doorbells of) neighbors, and providing literature identifying the clinic employee as a "baby killer."

H. On one occasion the respondent, Cadle, with others went to the vicinity of the motel where a staff physician was temporarily staying and demonstrated. While respondent, Cadle, remained outside just off the premises of the motel, others went upon the premises of the motel, some entering the motel lobby, yelling "child murderer" and "baby killer." The doctor testified that as a

result of such activity his departure for the clinic was delayed by one-half hour.

I. The same staff physician testified that on one occasion while he was attempting to enter the parking lot of the clinic, he had to stop his vehicle and remained stopped while respondent, Cadle, and others took their time to get out of the way and while doing so were yelling and screaming at the doctor, "Baby killer" – "We don't want you here in Melbourne." This physician also testified that he witnessed the demonstrators running along side of and in front of patients' vehicles, pushing pamphlets in car windows to persons who had not indicated any interest in such literature. As a result of patients having to run such a gauntlet, the patients manifested a higher level of anxiety and hypertension causing those patients to need a higher level of sedation to undergo the surgical procedures, thereby increasing the risk associated with such procedures. The doctor also testified that the noise of singing, chanting, shouting and yelling could be heard through the walls of the clinic and caused stress in the patients during surgical procedures and while recuperating in the recovery rooms. The doctor also testified that he observed some patients turn away from the crowd in the driveway to return at a later date. He testified that such delay in undergoing the procedures also increased the risk associated therewith.

J. On another occasion the doctor was followed as he left the clinic by a person associated with the respondents who communicated his anger to the doctor by pretending to shoot him from the adjoining vehicle. As a result of the foregoing demonstrations and activities, and after a physician similarly employed was killed by an

antiabortionist at a clinic in North Florida, this doctor terminated his employment with the clinic.

K. Further the testimony of witnesses shows:

1. That license tag numbers of the clinic's patients are recorded by the respondents or persons in concert with them and then are traced through state records to obtain the home address of such persons who are subsequently contacted by the respondents.

2. That on occasion repeated, nearly simultaneous, multiple telephone calls are made to the clinic, jamming its telephone lines. The jamming of the clinic's telephone system, makes it impossible for clinic staff to summon an ambulance to transfer any patient to the hospital should an emergency arise.

3. That patients and staff are sometimes followed in a stalking manner when they leave the clinic, giving such persons a feeling of great apprehension.

Conclusions

A. That the actions of the respondents and those in concert with them in the street and driveway approaches to the clinic of the plaintiffs continue to impede and obstruct both staff and patients from entering the clinic. The paved surfaces of the public right-of-way must be kept open for the free flow of vehicular traffic.

B. That the noise associated with the demonstrations impermissibly interferes with the operation of the clinic and the well-being of its patients and should be limited and restrained.

C. That the actions of the respondents and those acting in concert with them directed at the residences (including the temporary motel residence) of the clinic staff is impermissible conduct and should be limited and restrained. A person's home is his last place of refuge and his right of privacy therein should be protected. A place of business, not involved in the controversy of others, should not be subjected to demonstrations that interfere with business customers.

D. That the actions of the respondents and those acting in concert with them in respect to interfering with the telephone service of the clinic is impermissible and should be restrained.

E. That the uninvited contacts, shadowing and stalking by the respondents and those acting in concert with them of the clinic staff and patients are impermissible conduct and should be restrained.

F. That the rights of the respondents to demonstrate, speak and make known their views should be recognized and protected.

It is, therefore

ORDERED AND ADJUDGED that the respondents, Operation Rescue, Operation Rescue America, Operation Goliath, their officers, agents, members, employees and servants, and Ed Martin, Bruce Cadle, Pat Mahoney, Randall Terry, Judy Madsen, and Shirley Hobbs, and all persons acting in concert or participation with them, or on their behalf, with notice in any manner or by means of

this order (hereinafter referred to generally as respondents) are permanently enjoined from engaging in the following:

(1) At all times on all days, from entering the premises and property of the Aware Woman Center for Choice, Inc. Clinic (hereinafter Clinic) located at the northwest corner of U.S. Highway One and Dixie Way in Melbourne, Brevard County, Florida.

(2) At all times on all days, from blocking, impeding, inhibiting, or in any other manner obstructing or interfering with access to, ingress into and egress from any building or parking lot of the Clinic.

(3) At all times on all days, from congregating, picketing, patrolling, demonstrating or entering that portion of public right-of-way or private property within thirty-six (36) feet of the property line of the Clinic. The 36 foot buffer on the south side of the Clinic is demarcated by the south edge of paved surface of Dixie Way. It is the intent of the court that the respondents may use, subject to other restrictions contained herein, the unpaved portion (the shoulder) on the south side of Dixie Way. A drawing is attached hereto showing the various areas and lines. An exception to the 36 foot buffer zone is the area immediately adjacent to the Clinic on the east, lying in the right-of-way of U.S. Highway One. This area is composed of a flat shoulder area rising up an embankment to the easterly property line of the Clinic. The respondents may enter the shoulder area of U.S. Highway One, but may not go up the embankment and must remain at least five (5) feet from the Clinic's east line. Another exception to the 36 foot buffer zone relates to the record title owners

of the property to the north and west of the Clinic. The prohibition against entry into the 36 foot buffer zone does not apply to such persons and their invitees. The other prohibitions contained herein do apply, if such owners and their invitees are acting in concert with the respondents. Another exception to the 36 foot buffer zone relates to the area of the pedestrian crosswalk near the area where Dixie Way enters into U.S. Highway One. The testimony before the Court revealed that such crosswalk is not presently marked by customary white lines. It is the request of this court, in order to assist the parties in complying with this injunction, that the City of Melbourne establish a crosswalk area at the eastern end of Dixie Way in customary manner by applying painted lines on the surface of the pavement. Until such lines are applied, the respondents may use an area of the paved surface of Dixie Way as a crosswalk, but must confine their use of such area to a strip of pavement eight (8) feet wide, running directly from the south edge of Dixie Way to the north edge thereof, the westerly line of such strip being coextensive with the western right-of-way line of U.S. Highway One. (See drawing attached.) After painted lines are applied, the respondents must not enter any portion of the paved surface of Dixie Way outside of the crosswalk within the 36 foot buffer zone. The respondents use of the crosswalk must be limited to the prompt crossing of the street. The crosswalk may not be used as an area of picketing, congregating or demonstrating. The respondents use of the crosswalk must not inhibit or impede the free flow of traffic on Dixie Way, and no stopping or hesitation in the crosswalk shall be allowed.

(4) During the hours of 7:30 a.m. through noon, on Mondays through Saturdays, during surgical procedures and recovery periods, from singing, chanting, whistling, shouting, yelling, use of bullhorns, auto horns, sound amplification equipment or other sounds or images observable to or within earshot of the patients inside the Clinic.

(5) At all times on all days, in an area within three-hundred (300) feet of the Clinic, from physically approaching any person seeking the services of the Clinic unless such person indicates a desire to communicate by approaching or by inquiring of the respondents. In the event of such invitation, the respondents may engage in communications consisting of conversation of a non-threatening nature and by the delivery of literature within the three-hundred (300) foot area but in no event within the 36 foot buffer zone. Should any individual decline such communication, otherwise known as "sidewalk counseling", that person shall have the absolute right to leave or walk away and the respondents shall not accompany such person, encircle, surround, harass, threaten or physically or verbally abuse those individuals who choose not to communicate with them.

(6) At all times on all days, from approaching, congregating, picketing, patrolling, demonstrating or using bullhorns or other sound amplification equipment within three-hundred (300) feet of the residence of any of the petitioners' employees, staff, owners or agents, or blocking or attempting to block, barricade, or in any other manner, temporarily or otherwise, obstruct the entrances,

exits or driveways of the residences of any of the petitioners' employees, staff, owners or agents. The respondents and those acting in concert with them are prohibited from inhibiting or impeding or attempting to impede, temporarily or otherwise, the free ingress or egress of persons to any street that provides the sole access to the street on which those residences are located.

(7) At all times on all days, from physically abusing, grabbing, intimidating, harassing, touching, pushing, shoving, crowding or assaulting persons entering or leaving, working at or using services at the petitioners' Clinic or trying to gain access to, or leave, any of the homes of owners, staff or patients of the Clinic (unless permitted by "invited contact" as defined on page 10 of this order).

(8) At all times on all days, from harassing, intimidating or physically abusing, assaulting or threatening any present or former doctor, health care professional, or other staff member, employee or volunteer who assists in providing services at the petitioners' Clinic.

(9) At all times on all days, from encouraging, inciting, or securing other persons to commit any of the prohibited acts listed herein.

ORDERED AND ADJUDGED that nothing herein shall restrict duly constituted law enforcement authorities from providing traffic control and regulation and measures necessary to insure public safety and the protection of both public and private property.

ORDERED AND ADJUDGED that any City of Melbourne police officer or other person authorized to serve process may serve a copy of this order on any

individual who may not have otherwise received notice of the order. Such officer may read the operative prohibitory language of this order to any individual who is without notice of this order, and such service or oral notice shall subject the person so served or noticed to the sanctions provided for herein for failure to comply herewith. If the authorities of the City of Melbourne determine that it would assist them in enforcing this order to erect in the public right-of-way a notice that the use of the area specified herein as a buffer zone is subject to court order, they are authorized to do so. Such signs may contain the following language or words of similar import: "WARNING. Demonstrations and picketing in this area are limited by court order. Violators of this court order are subject to arrest. See Amended Permanent Injunction dated April 8, 1993, filed in Case No. 91-2811-CA-16-K, Circuit Court, 18th Judicial Circuit, Seminole County, FL. Copies of the Amended Permanent Injunction are posted at Brevard County Branch Courthouse, 50 S. Neiman Ave., Melbourne, FL; Sarno Complex, 1515 Sarno Road, Melbourne, FL; and Melbourne City Hall, 900 E. Strawbridge Ave., Melbourne, FL."

ORDERED AND ADJUDGED that, in order to provide for the protection of the owners, staff and patients of the Clinic and to prevent the further disruption of the operation of the Clinic, the court hereby enters the following additional orders:

a. Law enforcement officers and Southern Bell Telephone Company are authorized, upon request of the Clinic owners to place a trap on the telephone lines of the Aware Woman Center in order to identify those persons

engaged in a phone blockade and jamming of the Clinic's phone lines.

b. Law enforcement authorities, pursuant to the protective provisions of the court's order, are authorized to arrest those persons who appear to be in willful and intentional disobedience of this injunction. Upon such arrest the person so arrested shall be admitted to bail upon the posting of a $500 cash or surety bond, which bond will be returnable before the undersigned judge at his chambers, Room N327, Seminole County Courthouse, 301 N. Park Avenue, Sanford, FL at 8:30 a.m. on the seventh (7th) day after arrest exclusive of weekends and holidays. Any county or circuit judge in Brevard County is authorized to modify, upward or downward, the dollar amount and the return date of such bond upon good cause being shown. In the event of arrest and no bond being posted, the person arrested shall be promptly transferred to the Seminole County jail and the undersigned judge shall be immediately notified by the arresting officer and Seminole County jailer of such confinement. Such arrested persons shall be brought before the undersigned judge not later than 8:30 a.m. of the day following his confinement in the Seminole County jail.

ORDERED AND ADJUDGED that at all times on all days, respondents shall have the right to congregate, demonstrate and freely express themselves outside the Clinic buffer zone subject to the noise limitations on the days of surgical procedures set out in paragraph 4 of this order and subject also to all other provisions of this order and any other restraining orders and injunctions that may have been issued by other courts.

ORDERED AND ADJUDGED that at all times on all days, respondents will have the right of invited contact with persons protected hereby so long as it is outside of the Clinic buffer zone. "Invited contact" is defined as conduct by the person sought to be contacted which affirmatively indicates a desire to engage in conversation or to receive literature. Such affirmative indication may include where the person sought to be contacted physically approaches the respondent, or where such person extends his or her hand to receive literature, or speaks words indicating a positive interest in what the respondent is saying. Such invited contact by a person protected hereby as it relates to a contact at such persons residence is limited to conduct transmitted by the resident to a respondent at a distance from and at a time prior to the contact and shall not include the uninvited ringing of a doorbell or knock on a door. Any invited contact may be canceled by such person by words spoken that indicate a desire to end the contact, such as "stop", "withdraw", "back off", "get away", "leave me alone" or words or actions of similar import. Where such desire to end the contact is made known to a respondent, he/she must immediately terminate the contact and leave the presence of the person protected hereby.

ORDERED AND ADJUDGED that the permanent injunction of this court issued September 30, 1992, shall remain in full force and effect as to all persons and entities and places mentioned therein except as hereby modified.

Attached hereto and made a part hereof is a drawing which shows the Clinic buffer zone referred to in this order.

DONE AND ORDERED in Sanford, Seminole County, Florida this 8th day of April, 1993.

/s/ Robert B. McGregor
ROBERT B. MCGREGOR, Circuit Judge

Copies furnished to:

Talbot D'Alemberte, 215 S. Monroe St., Suite 601, Tallahassee, FL 32301

Kathy Patrick, 1100 Louisiana, Suite 3400, Houston, TX 77002

Jerri A. Blair, 351 W. Alfred St., Tavares, FL 32778

Christopher J. Weiss, Two S. Orange Ave., Orlando, FL 32802

Sheila Rae Eschenberg, 221 Avenida De Paz, Indiatlantic, FL 32903

Bruce Cadle, 701 Andrew St., N.E., Palm Bay, FL 32905

Patrick Mahoney, 1345 N.E. Fourth Court, Boca Raton, FL 33432 and at 613 Second Street, N.E., Washington, DC 20002

Randall Terry, RR2, Box 196, Harpursville, NY 13787-9536

by /s/ Doris D. Brady
Judicial Assistant

Date: April 8, 1993

NOT TO SCALE

INDICATES BUFFER ZONE

SHOULDER 4.5.1

EAST PROPERTY LINE

NORTH EDGE OF DIXIE WAY RIGHT-OF-WAY AND SOUTH PROPERTY LINE

SHOULDER 4.5.1

CROSSWALK

SOUTH E OF DIXIE RIGHT-O

25'

WOODED AREA

31'

34'

3'

DIRT ACCESS

67'

13'

DIXIE WAY

7'

DIRT ACCESS

WOODED AREA

AWARE WOMAN EAST PARKING LOT (PAVED)

42'

41'

SOUTH ED OF PAVED SURFACE DIXIE WA

36'

10' DIRT ACCESS

AWARE WOMAN CLINIC

SIDEWALK

SIDEWALK

41'

32'

10' PRIVATE DRIVEWAY

NORTH PROPERTY LINE

AWARE WOMAN WEST PARKING LOT (PAVED)

40'

36'

36'

51'

15

WEST PROPERTY LINE

SOUTH ED OF PAVED FACE OF DI WAY

SOUTH OF DIXIE

36'

36'

EXCERPTS FROM THE APRIL 12, 1993 APPEARANCE HEARINGS HELD BEFORE JUDGE MCGREGOR EIGHTEENTH JUDICIAL CIRCUIT, SEMINOLE COUNTY, FLORIDA

[Page 40, line 7 through page 44, line 7]

JANE DOE NO. 6: I do have a question, too. I'm confused as to why the people who were blockading the clinic who had pro-choice signs were not arrested along with me. They – it appeared to me they were violating the same injunction I was, you know –

THE COURT: The Injunction is directed only against certain named Defendants, certain named organizations and those acting in concert with them. Presumably, as you say, the other side would not have been acting in concert with the named Defendants.

JANE DOE NO. 6: But I was in concert with nobody. I was just an American citizen, defending the right to assemble and to demonstrate.

THE COURT: Again, perhaps, that would be a matter of defense that you would present at the time of trial.

JANE DOE NO. 6: So the Injunction only applies to people who are pro-life?

THE COURT: That's –

JANE DOE NO. 6: Is that fair? Is it Judge?

THE COURT: Well, the Court conducted three days of testimony and it determined that, you know, the prior injunction of the Court had been violated by denying access to the clinic by the activities conducted in the front

of the clinic. And that is why the Court had to redefine the earlier order. And of course, it applied to those who were working in concert with those who were – had been placed under an earlier injunction not to impede the access to the clinic.

JANE DOE NO. 6: So I don't have the right to believe that the treatment being done to the free born person needed someone to stand up in the defense of them?

THE COURT: No, ma'am. You have the absolute right to believe that.

JANE DOE NO. 6: But I must be incarcerated for it and they may believe what they want and not get –

THE COURT: No.

JANE DOE NO. 6: I guess I'm confused as to the justice.

THE COURT: No. You are impeding access to others who have a different belief and you do not have the right to impede the access or interfere with their right to enter the clinic.

JANE DOE NO. 6: I was just walking on the sidewalk. I was not impeding anybody that I knew of. Just praying on the sidewalk.

THE COURT: The three days of testimony that the Court heard found that those who were walking on the sidewalk and approaching the driveways caused the automobiles that sought to enter the clinic to slow down, hesitate, stop, at which time that others of your belief would approach the cars and attempt to interfere with

their process and to – it is the action of those on the sidewalk, in conjunction with others, who were there that combined together to deny the right of the access.

JANE DOE NO. 6: Was not that another case other than my own? I was not with that group or even there at that time.

THE COURT: Well, but again, an injunction applies to all persons acting in concert.

JANE DOE NO. 6: But I was not in concert with anybody.

THE COURT: Again, I say that at the time of your trial, perhaps, that would be a defensive matter. Although, I'm told by the Melbourne Police Department that everyone was put on notice that the thirty-six-foot area was a restricted area and then – if you presumably had notice of that and chose to enter, then, you chose to violate the Court's Injunction. That's why you were arrested.

JANE DOE NO. 6: I don't mean this disrespectfully, but does not the constitutional freedom to be on public sidewalk and to –

THE COURT: There is nothing in the constitution that says anyone is entitled to walk on any sidewalk.

JANE DOE NO. 6: But I have the right to demonstrate, the right to assembly, the right to religion and its practice and I was praying on the sidewalk. I don't understand –

THE COURT: And that will not be denied you, but it is subject to regulation. The Court provided the south shoulder of Dixie Way as an area for that to be done.

JANE DOE NO. 6: And you put people in jail for being on that sidewalk.

THE COURT: Because the combined efforts of those who were demonstrating, picketing and being in that area were, in effect, denying access to the clinic, which you do not have a right to deny others access to the clinic.

* * *

[Page 91, line 12 through page 93, line 9]

THE COURT: Do you have any questions?

MR. QUINTERO: Yes, sir. I quite don't understand why am I even here today. I have no knowledge of this injunction. This injunction was never served to me. I don't know why I was even mentioned in that injunction or anything else, if I am there or not. I haven't received it.

THE COURT: I've been told that the law enforcement officers on duty at the scene of the clinic put everyone on notice by public pronouncement that there was an injunction in effect and what areas that it governed. And that's, under the law, all they need to do is make sure you have notice of the Injunction.

MR. QUINTERO: But sir, I was there less than five minutes before I was arrested. I was not told by anybody anything about this. I would like to ask you –

THE COURT: Let me –

MR. QUINTERO: You asked me if I had a question.

THE COURT: Let me comment on it.

MR. QUINTERO: You asked me if I had a question.

THE COURT: Let me comment on it. Mr. Quintero, if that be true, that may be a defensive matter and you need to discuss with your lawyer that aspect of the case and of course present it at the time of trial.

MR. QUINTERO: What I would like to ask you or what I would tell you is that apparently I haven't seen this injunction, but apparently whoever the judge was that issued this injunction, I assume it was you, named me as one of the people in that injunction, because I am here today, I was arrested on this, so I would like to know how –

THE COURT: You were not named in it except you were included in the phrase of those who are working in concert with the named Defendants.

MR. QUINTERO: And who are these Defendants? I have no idea.

THE COURT: They're set out in the Injunction.

MR. QUINTERO: Because I'm not working in conjunction with anybody. I don't know anything. I don't belong to any group that is doing absolutely anything like this. I am just a normal Christian that went to pray on the sidewalk.

* * *

[Page 104, line 20 through page 105, line 18]

MR. LACY: You mentioned to other John Does that we were arrested for being in a public place in concert

with people that were on the Injunction whether we had read the Injunction or not. And I was wondering how we can – why we were arrested and confined as being in concert with these people that we don't know, when other people weren't, that were in that same buffer zone, and it was kind of selective as to who was picked and who was arrested and who was obtained for the same buffer zone in the same public injunction.

THE COURT: Mr. Lacy, I understand that those on the other side of the issue were also in the area. If you are referring to them, the Injunction did not pertain to those on the other side of the issue, because the word in concert with means in concert with those who had taken a certain position in respect to the clinic, adverse to the clinic. If you are saying that is the selective basis that the pro-choice were not arrested when pro-life was arrested, that's the basis of that selection. If others who are pro-life were not selected, I can't answer that. It is the officer's discretion on the scene as to who he arrests.

* * *

[Page 112, line 24 through page 116, line 18]

THE COURT: Do you have any questions?

JOHN DOE NO. 16: I understand from the conversation that's taken place so far that I'm being arrested because I was perceived to have been acting in concert with those who were praying or violating any of the other injunctions in the Court Order. Is that true?

THE COURT: Yes, sir.

JOHN DOE NO. 16: On what basis was that determination made?

THE COURT: Whatever activities you were engaged in seemed to be supportive of pro-life.

JOHN DOE NO. 16: Now, I also understand that there were other people in the area that were considered to be not pro-life or not sharing our beliefs and I acknowledge this. On what basis were those people not arrested?

THE COURT: Because they weren't subject to the Injunction.

JOHN DOE NO. 16: Okay. And what was the reason for that?

THE COURT: They had not attempted to block entrance into the clinic over the past year.

JOHN DOE NO. 16: This was the first time that I was in this area myself and I had not attempted to block an entrance to a clinic in that town or anywhere else in the State of Florida in the last year or ever.

I also understand that the reason why I was arrested was because I acted in concert with those who were demonstrating pro-life. I guess the questions that I'm asking is were the beliefs in ideologies of the people that were present, were those taken into consideration when we were arrested?

THE COURT: In the Court issuing the Injunction, yes, I had provided that the area on the south shoulder of this right-of-way was reserved for those who wished to, you know, protest, demonstrate, but that the traveled portion of the street was to be maintained for vehicular traffic, for vehicular traffic and entrance into the clinic could not be impeded.

JOHN DOE NO. 16: My understanding is that there were other demonstrators in the restricted area that were not acting in concert with us. And I wanted to know how that determination was made.

THE COURT: Whatever the police officer perceived by looking.

JOHN DOE NO. 16: Were the beliefs in ideology of those people, did that have anything to do with the determination in the Injunctive Order or in the arrest?

THE COURT: You know, I wasn't there. I don't know. All I know is that the officer used his perceptions, his eyes, his ears, took note of the activities that were going on and for reasons, you know, he believed that you were in concert with those that had been enjoined and the Injunctive Order is expanded to include those so that you were subject then to the Injunction.

JOHN DOE NO. 16: When you issued the Injunctive Court Order did you include what someone might believe about abortion or about the right to assemble there, or let's just say about abortion as a basis for arrest?

THE COURT: I considered all of the evidence before me.

JOHN DOE NO. 16: Okay. If I was to stand here, if I was to testify that I did not oppose abortion would that make any difference in my arrest?

THE COURT: You can't be unarrested. You have been arrested.

JOHN DOE NO. 16: What about being charged with violating the Court Order?

THE COURT: It will be up to the prosecutor, the State Attorney, to make a charge decision. And sometimes lawyers in representing clients will go to a prosecutor in advance of his charge decision and ask that he, you know, consider additional matters that might cause him to not make such a charge decision. Those are matters lawyers best know how to do.

JOHN DOE NO. 16: When you issued the Injunction did you determine that it would only apply to – that it would apply only to people that were demonstrating that were pro-life?

THE COURT: In effect, yes.

* * *

[Page 119, line 22 through page 120, line 4]

MR. MacLEAN: Respectfully, sir, where on my arrest report does it allege that I was acting in concert with anyone?

THE COURT: It is embodied in the phrase violation of the Injunctive Court Order. But again, this is an arrest report. It is not a formal charge. Presumably within the formal charge there will be that reference, sir.

* * *

[Page 124, line 5 through page 125, line 7]

THE COURT: Okay. Do you have any questions?

JOHN DOE NO. 19: All I can tell you I was just, I wasn't in concert with anybody. I was standing here, there was another lady standing here, and somebody from the clinic comes up and says take me. And the

(inaudible) standing next to me is there. And you couldn't tell the difference between the (inaudible) and myself. So the police – the perception of the police was influence by someone from the clinic. I mean I was standing there with my hands in my pockets, the lady here standing there with her hands in her pockets. I get taken away. She stays there because somebody come over to me and says take me. That's the perception of the police.

Now, in my, whatever this – what do you call this?

THE COURT: The arrest report.

JOHN DOE NO. 19: The arrest report I notice the repetition [sic] of the phrase, if I can tell you, Defendant resisted arrest by falling to the ground, refusing to walk to the van. All of the reports by Officer Rodriguez – I never fell to the ground. My knees never touched the ground. All the reports by Rodriguez uses that phrase. He seems to like the sound of that phrase. I never fell to the ground.

* * *

[Page 134, line 18 through page 135, line 17]

JOHN DOE NO. 27: Finally, there was a – at the time I was on the sidewalk praying, there was a lady named I think Kathy, working with the Aware Woman Clinic there in Melbourne, and she was walking up and down directing the police to arrest certain people. And again, that's why I need a copy of the Injunction. I want to know if she was authorized to work with the Melbourne Police Department in directing them [sic] who to arrest.

THE COURT: Not according to the Court's Order.

JOHN DOE NO. 27: I'm sorry, sir?

THE COURT: Not according to the Court's Order. But understand, the police have the right as in any criminal investigations to ask people who have information about a law violation you know, what do you know or what did you see. I wasn't there. I don't know. I understand what you say. But police can get their information from, you know, people who have information that would assist them in making a decision.

JOHN DOE NO. 27: I didn't hear them ask her, Your Honor. The words I heard from Kathy was I want this one. I just want to state that.

* * *

[Page 148, line 5 through page 149, line 18]

THE COURT: Do you have any questions?

JOHN DOE NO. 31: Yes, I do. Just to clarify in my mind because I'm not used to this type of thing. I wasn't arrested at Aware Woman Clinic.

THE COURT: I said in the vicinity.

JOHN DOE NO. 31: Okay, because I was arrested on a public street, Dixie Way I believe is the name of it. But I have a question. I know others have asked this, but I'm still not clear on it. How did the police determine that I was acting in concert with some organization that was named on this injunction? I again am a person who haven't seen this injunction. So how did the police determine that I was acting in concert?

THE COURT: They observed your activities and determined in their minds whether or not what you were doing was in concert with the – I gather the pro-life position of the other, of the named Defendants.

JOHN DOE NO. 31: I'm still confused, Your Honor. What kind of activities would those be? I mean how could they just by looking at me determine that I was acting in concert? I want to know what I –

THE COURT: You were there. I wasn't. I can't give you anymore than what I've given you. You know what you were doing.

JOHN DOE NO. 31: If I were to tell you, Your Honor, today that I am a pro-choice person, would you drop the injunctive charges against me?

THE COURT: I can't do it now because the arrest has been made. There needs to be a charge decision. And again as I told one other, if his lawyer, you know, were to go to the prosecutor and say you've got a big mistake here, this fellow is on the other side of the issue and convince the prosecutor of that, perhaps the prosecutor wouldn't bring the formal charge.

* * *

April 15, 1993

VIA FAX

The Honorable Robert B. McGregor
Eighteenth Judicial Circuit
301 N. Park Avenue
Sanford, FL 32771

Re: *Women's Health Center, Inc., et al. v. Operation Rescue, et al.,*
Case No. 91-2811-CA-16-K

Dear Judge McGregor:

When we were last in Court (April 2nd), you mentioned that you might entertain suggestions from counsel on the Court's injunctive order after you had drafted it. If this is still in order, the petitioners suggest that you consider the modifications suggested in the attached papers. These are drafted in "legislative" style with the cross-through language being that deleted and the underlined language added.

Respectfully,
/s/ Talbot D'Alemberte/jd
Talbot D'Alemberte

TDA/jd
Enclosures
cc: Jerri A. Blair (w/encl)
Bruce Cadle (w/encl)
Susan England (w/encl)
Sheila Rae Eschenberg (w/encl)
Patrick Mahoney (w/encl)
Kathy Patrick (w/encl)
Kathy Spillar (w/encl)
Randall Terry (w/encl)
Christopher J. Weiss (via fax w/encl)

From page 5:

ORDERED AND ADJUDGED that the respondents, Operation Rescue, Operation *Rescue National*, Rescue America, Operation Goliath, their *partners*, officers, agents, members, employees and servants, and Ed Martin, Bruce Cadle, Pat Mahoney, Randall Terry, Judy Madsen, and Shirley Hobbs, and all persons acting in concert or participation with them, or on their behalf, with notice in any manner or by means of this order (hereinafter referred to generally as respondents) are permanently enjoined from engaging in the following:

From page 7:

(4) During the hours of 7:30 a.m. through noon, on Mondays through Saturdays, during surgical procedures and recovery periods *(as posted at the Clinic)*, from singing, chanting, whistling, shouting, yelling, use of bullhorns, auto horns, sound amplification equipment or other sounds ~~or images observable to or~~ within earshot of the patients inside the Clinic.

From page 7:

(5) At all times on all days, in an area within three-hundred (300) feet of the Clinic, from physically approaching any person *rendering services to the Clinic or* seeking the services of the Clinic ~~unless~~ *where* such person indicates ~~a desire~~ *an apparent unwillingness* to communicate ~~by approaching or by inquiring of the respondents~~. In the event of ~~such invitation~~ *circumstances where there is a desire or apparent willingness to communicate*, the respondents may engage in communications consisting of conversation of a non-threatening nature and by the delivery

of literature within the three-hundred (300) foot area but in no event within the 36 foot buffer zone. Should any individual decline such communication, otherwise known as "sidewalk counseling", that person shall have the absolute right to leave or walk away and the respondents shall not accompany such person, encircle, surround, harass, threaten or physically or verbally abuse those individuals who choose not to communicate with them.

From page 8:

(9) At all times on all days, from ~~encouraging~~ *directing*, inciting, or securing other persons to commit any of the prohibited acts listed herein.

ORDERED AND ADJUDGED that any City of Melbourne police officer (*or other law enforcement official as appropriate*) or other person authorized to serve process may serve a copy of this order on any individual who may not have otherwise received notice of the order. Such officer may read the operative prohibitory language of this order to any individual who is without notice of this order, and such service or oral notice shall subject the person so served or noticed to the sanctions provided for herein for failure to comply herewith. If the authorities of the City of Melbourne determine that it would assist them in enforcing

(paragraph is continued unchanged)

IN THE CIRCUIT COURT OF
THE EIGHTEENTH JUDICIAL
CIRCUIT IN AND FOR
SEMINOLE COUNTY, FLORIDA

CASE NO. 91-2811-CA-16-K

WOMEN'S HEALTH CENTER,
INC., AWARE WOMAN CENTER
FOR CHOICE, INC., et al.,

Petitioners,

-vs-

OPERATION RESCUE,
OPERATION RESCUE AMERICA,
OPERATION GOLIATH, ED
MARTIN, BRUCE CADLE, et al.,

Respondents.
_____/

MOTION TO INTERVENE AND TO CLARIFY
AMENDED PERMANENT INJUNCTION

The City of Melbourne [hereinafter "the City"], pursuant to Fla. R. Civ. P. 1.230, moves the Court for an order (1) allowing it to intervene in the above-styled actions solely for purposes expressed herein and (2) clarifying the Amended Permanent Injunction, for the following reasons:

1. On April 8, 1993, this Court entered an Amended Permanent Injunction [hereinafter "the Injunction"].

2. The City was not a party to the action resulting in the Injunction. The Injunction significantly affects the interest of the City, however, in that the Injunction authorizes the law enforcement officers of the City to enforce

the Injunction. The Injunction expressly provides, among other things, that

> [A]ny City of Melbourne police officer or other person authorized to serve process may serve a copy of this order on any individual who may not have otherwise received notice of the order.

The Injunction further provides:

> Law enforcement authorities, pursuant to the protective provisions of the court's order, are authorized to arrest those persons who appear to be in willful and intentional disobedience of this injunction.

3. The City seeks to intervene solely to have this Court clarify the City's enforcement obligations under the Injunction. The City does not seek through this motion to question the merits or lawfulness of the Injunction, and the City recognizes that its intervention is in subordination to the main proceeding.

4. The City is directly affected by the Injunction because, although the Injunction apparently authorizes all law enforcement authorities to enforce the Injunction, the Aware Woman Clinic is located within the jurisdiction of the City's law enforcement authorities. Consequently, the burden of enforcing the order has fallen upon the City. In the belief that the Injunction imposes a duty upon the City's law enforcement officers to enforce the Injunction, the City has, pursuant to the Injunction, taken into custody over 100 persons. The City is further affected by the Injunction in that representatives of both the Petitioners' and the Respondents' points of view have threatened the City with litigation over the enforcement of the Injunction. Hence, the City requests guidance from this

Court as to how the City's law enforcement authorities are to enforce the Injunction.

5. When doubt exists as to the scope of the injunction or the things that may or may not be done thereunder, it is proper to apply to the court that issued the injunction for a construction of its terms. See 42 Am. Jur. 2d *Injunctions* § 337 (1969) (citing *New Jersey v. City of New York*, 296 U.S. 259, 56 S. Ct. 188, 80 L. Ed. 214 (1935)).

6. The City has interpreted the Injunction as imposing upon its law enforcement authorities the legal duty of enforcing the Injunction. This conclusion is in accordance with the well-established rule that police officers are not to act as pseudo-appellate courts scrutinizing the orders of judges, and that police officers must fearlessly and unhesitatingly execute court orders unless the court, or a higher court, directs otherwise. See, *e.g.*, *Turney v. O'Toole*, 898 F.2d 1470 (10th Cir. 1990); *Valdez v. City & County of Denver*, 878 F.2d 1285 (10th Cir. 1989).

7. Specifically, the City requests the Court's guidance in interpreting the provisions that

> the Respondents, Operation Rescue, Operation Rescue America, Operation Goliath, their officers, agents, members, employees and servants, and Ed Martin, Bruce Cadle, Pat Mahoney, Randall Terry, Judy Madsen, and Shirley Hobbs, *and all persons acting in concert or participation with them, or on their behalf,* with notice in any manner or by means of this order (hereinafter referred to generally as respondents) are permanently enjoined from engaging in the following:
>
> . . . .

> At all times on all days from congregating, picketing, patrolling, demonstrating, or entering that portion of public right-of-way or private property within thirty-six (36) feet of the property line of the Clinic.

8. The City has interpreted the previously cited provisions by taking into custody and bringing before the Court those persons who, after specific notice of the Injunction's terms, refused to comply and continued to congregate in, picket, patrol, demonstrate in, or enter the "buffer zone." The City requests the Court's guidance as to whether the City is required to make further determination concerning whether persons are "acting in concert or participation" with the Respondents. If such further determination is required, the City requests the Court to advise how such determination is to be made other than by the actions of the individuals, particularly since the named Respondent groups are unincorporated organizations.

9. Thus, the City seeks this Court's guidance as to whether the City is enforcing the Injunction in accordance with this Court's intention and, if not, an explanation of what is required to comply with the Injunction.

WHEREFORE, the City respectfully requests this Honorable Court to issue an order

(1) allowing the City to intervene in this matter, and

(2) providing guidance to the City as to the proper construction of the terms of the Injunction.

Respectfully submitted,

REINMAN, HARRELL, GRAHAM,
MITCHELL & WATTWOOD, P.A.
1825 S. Riverview Drive
Melbourne, Florida 32901
Telephone: (407) 724-4450

/s/ James L. Reinman
JAMES L. REINMAN
Florida Bar No. 183537
Attorneys for City of Melbourne

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing has been furnished by U.S. Mail to TALBOT [sic] D'ALEMBERTE, 215 S. Monroe Street, Suite 601, Tallahassee, Florida 32301; KATHY PATRICK, 1100 Louisiana, Suite 3400, Houston, Texas 77002; JERRI A. BLAIR, 351 W. Alfred Street, Tavares, Florida 32778; CHRISTOPHER J. WEISS, Two S. Orange Avenue, Orlando, Florida 32802; SHEILA RAE ESCHENBERG, 221 Avenida De Paz, Indiatlantic, Florida 32903; BRUCE CADLE, 702 Andrew Street, N.E., Palm Bay, Florida 32905; PATRICK MAHONEY, 1345 N.E. Fourth Court, Boca Raton, Florida 33432; and RANDALL TERRY, RR 2, Box 196, Harpursville, New York 13787-9536, on this *18th* day of May, 1993.

/s/ James L. Reinman
JAMES L. REINMAN
Florida Bar No. 183537

THE FLORIDA SUPREME COURT'S OPINION DATED OCTOBER 28, 1993 CAN BE FOUND ON PAGE A-1 OF THE APPENDICES OF THE PETITIONERS' PETITION FOR WRIT OF CERTIORARI

IN THE CIRCUIT COURT OF THE
EIGHTEENTH JUDICIAL CIRCUIT IN AND
FOR SEMINOLE COUNTY, FLORIDA

WOMEN'S HEALTH CENTER, INC., AWARE WOMAN CENTER FOR CHOICE, INC., EPOC CLINIC, INC., and CENTRAL FLORIDA WOMEN'S HEALTH ORGANIZATION, INC.,	)	
Plaintiffs/Petitioners,	)	CASE NO.
vs.	)	91-2811-CA
OPERATION RESCUE, OPERATION RESCUE AMERICA, OPERATION GOLIATH, Ed Martin, Bruce Cadle, Pat Mahoney, Randall Terry, Judy Madsen, and Shirley Hobbs,	)	
Defendants/Respondents.	)	

PLAINTIFFS/PETITIONERS' OPPOSITION TO CITY OF MELBOURNE'S MOTION TO INTERVENE

The Plaintiffs/Petitioners respond to the City of Melbourne's Motion to Intervene and state their opposition to the motion. As grounds therefore [sic], they state:

1. The motion seeks intervention for purposes of an advisory opinion which is not within the role of the courts in Florida and is particularly inappropriate where a non-party seeks to intervene.

2. If the city needs an advisory opinion on the City's duties to enforce the law or on the subject of police

power generally, the Attorney General is available to provide an advisory opinion to the City. The undersigned counsel represents that he has checked with the Deputy Attorney General and has learned that the Attorney General's office stands ready to provide such an opinion on request.

3. The City's motion is untimely. The injunctive order now is on appeal and issues relating to it have been briefed by the parties.

/s/ Talbot D'Alemberte
TALBOT D'ALEMBERTE
Florida Bar No. 017529
215 S. Monroe St., Suite 601
Tallahassee, FL 32301
(904) 222-2300

KATHY PATRICK
Texas Bar No. 15581400
1100 Louisiana, Suite 3400
Houston, TX 77002
(713) 650-8805

COUNSEL FOR PLAINTIFFS

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by U. S. mail to Christopher J. Weiss, Two S. Orange Avenue, Orlando, FL 32802; Sheila Rae Eschenberg, 221 Avenida De Paz, Indiatlantic, FL 32903; Bruce Cadle, 701 Andrew St., N.E., Palm Bay, FL 32905; Patrick Mahoney, 1345 N.E. Fourth Court, Boca

Raton, FL 33432 and at 613 Second Street, N.E., Washington, D.C. 20002; and Randall Terry, RR 2, Box 196, Harpursville, NY 13787-9536 on this ___ day of May, 1993.

/s/ Talbot D'Alemberte
TALBOT D'ALEMBERTE

IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA
FIFTH DISTRICT

OPERATION RESCUE, OPERATION RESCUE AMERICA, OPERATION GOLIATH, ED MARTIN, BRUCE CADLE, JUDY MADSEN, et al.,

Appellant,

v. Case No. 93-969

WOMEN'S HEALTH CENTER, INC., AWARE WOMAN CENTER FOR CHOICE, INC., et al.,

Appellee.

_____/

DATE: June 3, 1993

BY ORDER OF THE COURT:

The Appellants seek review of an order of the Circuit Court for Seminole County, Florida, granting a permanent injunction sharply restricting demonstrations outside an abortion clinic. The Appellants allege that the injunction infringes upon the exercise of the First Amendment rights to peacefully demonstrate, picket, distribute literature and express one's self on public property, sidewalks, roadways, and rights of way. The Appellees argue that the injunction protects their First Amendment rights, their rights to privacy, their rights to engage in business activity, and their clients' rights to obtain medical treatment. Appellants have and are engaging in such activities on a statewide basis that similar injunctions have been issued throughout the state. The constitutionality of the

injunction(s), require immediate resolution by the Florida Supreme Court. Accordingly, it is

ORDERED that the JOINT MOTION FOR CERTIFICATION OF CASE TO THE FLORIDA SUPREME COURT, filed April 27, 1993, is granted. Moreover, it is

ORDERED that this Court hereby certifies that the constitutionality of the injunction issued below is an issue of great public importance and one which will have a great effect on the proper administration of justice throughout the State. This Court therefore requests the Supreme Court of Florida to accept jurisdiction of this case pursuant to Florida Rule of Appellate Procedure 9.125.

I hereby certify that the foregoing is
(a true copy of) the original court order.

FRANK J. HABERSHAW, CLERK

(COURT SEAL)

cc: Talbot D'Alemberte, Esq. Kathy Patrick, Esq.
Bruce Cadle, Esq. Jerri Blair, Esq.
Patrick Mahoney, Esq. Christopher Weiss, Esq.
Randall Terry, Esq. Sheila R. Eschenberg, Esq.
Mathew D. Staver, Esq., and Jeffrey T. Kipi, Esq.
Hon. Sid J. White, Clerk, Florida Supreme Court
(with case file)

PLAINTIFF'S EXHIBITS INDEX

CASE #: 92-2811 CA

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WARNING, WARNING, WARNING, WARNING

CHILD-KILLER INSIDE COMFORT INN !

FRANK SNYDLE

A KNOWN CHILD KILLER
SPENT LAST NIGHT AT THIS COMFORT INN!
MR. SNYDLE TRAVELS OVER
100 MILES TO MELBOURNE TO

KILL PRE-BORN CHILDREN

EVEN THOUGH AMERICA HAS
TEMPORARILY LEGALIZED ABORTION,
GOD STILL CALLS IT MURDER!

PLEASE ASK COMFORT INN NOT TO ALLOW THIS KNOWN CHILD-KILLER TO STAY IN THEIR HOTEL!

Meredith Raney
2488 Burns Ave.
Melbourne, FL 32935
Ph. 407-254-5481
Dec. 29, 1992

Dr. Frank Snydle
2950 Crump Rd.
Winter Haven, FL 338811

Dear Dr. Snydle,

You may not be aware of the activities planned for Melbourne over the next 3 months. The enclosed newspaper articles talk about them a little bit. You may not want to be a part of it.

Sincerely yours,

Meredith Raney

FL Today 12/24/92

Pro-Life activists
to converge on Brevard

By Patricia Baird Windle
Melbourne

From Jan. 18 to April 11, anti-abortion leaders from all over the nation are coming to Melbourne to start a new technique they euphemistically call "Impact team training."

No matter what they call it, no matter how they dress it up, it still spells "school for conspiracy," a way to

practice new and old nasty, illegal tactics against abortion clinics.

The "faculty" for this terrorist school includes well-known criminals who have arrest records in cities across the nation and hundreds of other arrests among them collectively.

Among those they have led, arrests number tens of thousands, including in the despicable blockades using small children. The "students" are coming to learn all of the vicious, illegal practices their leaders can dream up.

While fomenting [sic] conspiracy to commit illegal acts across the land, they will practice here in Central Florida at Aware Woman Clinic in Melbourne and Port St. Lucie. Their "field trips" to "practice" will cost you plenty.

The bills for cops and prosecution in Wichita hit $1 million, and even more in Milwaukee.

This money would be better spent in fighting street crime and drug crime and for safety in our public schools – not on the ugly behavior of a bunch of frustrated fanatics and schoolyard bullies.

FL. 12/28/92

Pro-life activists to train in Brevard

by Stephanie Reitz
FLORIDA TODAY

Pro-life activists nationwide will make Brevard County their training ground from January to April.

Operation Rescue, a national group based in Summerville, S.C., plans to hold its first 12-week session training pro-life Christians and forming IMPACT teams.

The teams' initials stand for Institute of Mobilized Prophetic Activated Christian Training. Their purpose: "true spiritual warfare . . . that will function as a force of righteousness" for the pro-life movement, its registration pamphlet states.

The activity will be monitored by Melbourne police and the owners and employees of the Aware Woman Center for Choice, a Melbourne clinic that provides abortions, pregnancy testing and prenatal care.

"I believe this conference is an obvious formation of a (national) conspiracy, and they'll probably use a lot of their old tricks on us and whatever new things they can think up," said Aware Woman founder Patricia Baird Windle.

Brevard's most active pro-life group is Operation Goliath, a local chapter of Operation Rescue. It is headed by Palm Bay resident Bruce Cadle, who also is Operation Rescue's southeastern director.

Cadle could not be reached for comment, but has been active in arranging sidewalk counselling, picketing

and protests outside Aware Woman and other clinics nationwide.

Those tactics are expected to be covered in the training session, which runs from Jan. 18 to April 9. It will feature weekly public rallies and speeches from prominent pro-life activists and religious leaders.

The almost 50 trainees will stay with Operation Goliath members and other local pro-life activists.

"One day you may make a house call, one day will be sidewalk counseling, and of course, the threat of rescue will hang over the killers' heads every day because you will be there," the registration pamphlet reads. A second 12-week session will be held this summer in a mid-western city.

Pro-choice leaders suspect Brevard was picked not only because it is home to Operation Goliath, but also because Florida has been considered a safe state for abortion providers.

OPERATION RESCUE

FLORIDA I.M.P.A.C.T.

Local Address:
PO BOX 100037
Palm Bay, FL 32910
407-259-9557

PO Box 127
Summerville, SC 29484
Office (803) 821-8441
Fax (803) 821-8583

February 16, 1993

Dear Friend:

Greetings in Jesus' Name!

The IMPACT team training and weekly rallies have had an effect in Central Florida. In the coming weeks we believe the testimonies of saved and changed lives will continue to spread throughout Florida. More of God's people are beginning to see that child killing isn't just another issue. Unfortunately, some are still standing by, waiting to see what will happen. I believe God wants to bring us to the point where we do what is right not merely what is popular.

It continues to revolt me to see how much of the Christian community depends on good press as a basis of their actions. They seem to have forgotten that Jesus was not crucified because He was popular. More than ever we are going to have to take a stand and identify with the babies. We must be willing to have our character assassinated. Those in the abortion industry will sling mud as fast as they can. They will do anything to keep the focus away from dead babies and hurting women.

It is sad to say that they know the tactic will work against Christians. Too many Christians value their personal comfort and reputation more that God's laws and purposes. Jesus said, "whosoever shall lose his life for my sake shall find it." It is as true today as the day He said it.

Truth does conquer and people must be exposed to the Truth. Many believers have summarily passed judgment against Operation Rescue and others based on media accounts. The Church must be wise enough to understand that the media is not telling the truth. That is one reason why we have rallies each week. These meetings are critical. They offer much needed inspiration and perspective to the committed, and they allow the undecided or prejudiced Christian to gain a fuller understanding of the battle. All rallies begin at 7:00 pm. Please call the office for rally locations. Over the next weeks, the rallies will have dynamic speakers including Randall Terry, Pat Mahoney, Richard Exley and Dr. Beverly McMillan. Randall has pioneered the modern rescue movement with a call to the body of Christ to repent from sins of omission. Pat has, for the last fourteen years, been an outspoken advocate for the struggling and oppressed in our society. He is presently the director of the Christian Defense Coalition in Washington, DC. Richard is a pastor, author, radio host, pro-life apologist and activist.

Dr. Beverly McMillan, a former abortionist, will be speaking at Our Lady of Lourdes Church located at the corner of Oak and Fee in Melbourne on Friday, February 26th. Dr. McMillan will also be speaking at a ladies only luncheon on at 12:00 noon on the same day. It will take place at Sweetwaters Restaurant located at 465 S. Wickham Road in Melbourne. There is a [sic] $8.00 donation

requested and tickets are required. Please call the IMPACT office at 407-259-9557 for further information.

We are bringing leaders of this caliber here because we believe God has His hand on Florida. We are doing all we can to see the sacrificial seed that has been sown here come to fruition. Reach out and bring a friend to a rally and help spread the seeds of revival that God is sowing in Florida.

I want to ask you to do all you can to help us. Your generosity on behalf of the children and the future of our nation is very needed right now. This is no time to give up or give in. We must press on. No amount you give is too insignificant or too large. It is a life or death battle.

The Lord is using many people to make a difference. We have seen many victories on the street. Several children and their moms have been saved from death and exploitation. One of the couples that the Lord saved from certain destruction was married this past Sunday in a ceremony that was provided, planned and attended by caring Christian people. In response to these victories, the abortuary pressured the Melbourne Police Department to restrict Christians from reaching abortion bound moms by keeping them away from the entrance to the death-camp. The following week the police removed the barricades when they received a clear message that many people were willing to risk arrest if they were not permitted to continue to pray, preach and pass out literature where they always had.

Don't miss the opportunity to be a part of the move of God that is going on in Florida. The lives and futures of families are being effected by the presence of the

IMPACT team and local people who are stepping out and saying "NO" to the child-killers. Join us at the Friday Night rallies and on the street on Saturday. Your presence can make a life or death difference to a little boy or girl that is scheduled for execution. Your financial investment in the lives of the next generation of Floridians is critical. Please do all you can now to stand with those who are a voice for the voiceless.

In the Master's Service,

/s/ Keith
Keith Tucci
Executive Director
Operation Rescue National

/s/ Bruce
Bruce Cadle
Field Director
Operation Rescue National

I am committed to winning Florida over for Jesus and Life. Enclosed is a gift of ___ to help make an IMPACT in my area.

Operation Rescue National

Florida Impact News

Two Rescues, Three Saved Babies,
No Arrests, and a Wedding

On Saturday, February 6th, the IMPACT team participated in not one, but two rescues. Thirty rescuers arrived

at 7:45 am and went immediately to the doors of Aware Woman Abortuary in Port St. Lucie.

After the doors were blocked, sidewalk counselors were able to offer the moms assistance and alternatives. One of the moms definitely changed her mind and chose life for her baby. After the women were turned away, the rescuers voluntarily left the property without arrests.

At 2:15 the same rescuers arrived at a Woman's World killing center in Ft. Pierce. They immediately sat in front of the doors, preventing the babies who were scheduled to die from being dragged into the mill.

Once again the sidewalk counselors were able to persuade two of the moms to choose life for their babies. One of the couples decided to get married. The rescuers were able to leave the doors after turning the women away without a warning from the Ft. Pierce police.

Tom and Penny's Wedding

"I had prayed, God, if You're real, have someone there to stop us," Penny told the sidewalk counselor. That Saturday, at an abortion mill that never has pro-lifers outside to offer alternatives, over 30 showed up in answer to Penny's prayer.

Tom and Penny had arrived early for their appointment, but sat in their van crying and talking. New in town, they had no jobs, no friends, no family support, no stable home. Though Tom adores their first child, he couldn't see how they could handle a second. Penny thought Tom would leave her if she kept this child that

she already dearly loved. Both thought the other wanted an abortion.

Tom knew something was up when he saw a school bus full of people slowly drive by. A few minutes later dozens of people were standing in front of the mill doors. A counselor approached their van and asked if they wanted to talk. "You need to talk with me," she said. "I've had three abortions. I can tell you what's going to happen to you."

Fifteen minutes later, Tom and Penny had not only decided to keep their child – they also decided to get married! Keith Tucci offered to officiate, saying, "Hey, Weddings R Us! We'll put it together for you. Just tell us when."

They chose Valentine's Day – one week away! Valerie Cadle made all the arrangements. Almost everything was donated – from the wedding dress and tux to a hotel room for the wedding night. Over 110 people came to show their support and excitement.

During the ceremony Keith exhorted them, "Only one week ago your lives were headed toward tragedy. If you ever question if you're supposed to be married, just remember all that God had done to bring you here." The whole audience erupted in applause and praise to God.

"It's the best wedding I've ever been to" was heard again and again. It was a celebration that allowed people to truly share in the joy of God's redeeming power.

JOURNALISTIC INTEGRITY – NOT!

USA TODAY recently came to Melbourne to do a story on the IMPACT team training school. One of the many questions that reporter Deborah Sharp asked us was do we participate in vandalism. We told her absolutely not. Monday, February 1st her story appeared on page 2a, a very highly read section of the paper. It stated that our tactics include vandalism. It didn't say alleged vandalism, it didn't say we were accused of vandalism, it said we do vandalism. Keith Tucci was outraged and called the reporter immediately to ask why she had written such a blatant lie.

After some hesitation, she responded that in fact she did not write that part of the story, but that one of her editors, Mimi Hall, had inserted that statement into the article. Mimi admitted inserting the statement, but said that Bruce Cadle boasted in an earlier USA TODAY article that vandalism is one of our tactics. Bruce's actual statement was a total denial of vandalism.

ORN is asking for a retraction, and is also investigating legal remedies.

CHRISTIANITY OUTLAWED IN MELBOURNE

On Saturday, February 6th, Christians arrived at Aware Woman abortuary in Melbourne, to find out that the practice of their Christian faith had suddenly become illegal. On this particular day, Christians were not allowed to preach, pray, or pass out tracts on the public sidewalk, on a public street, or on other public property.

Sidewalk counselors were told that even if a car voluntarily stopped and wanted literature, they would be arrested if they stepped out to hand it to them!

There was even a police checkpoint to stop approaching vehicles. If the vehicle was going to the abortion mill, it was allowed to drive down the public street, but Christians were herded behind barricades across the street, unable to offer help to the women in crisis pregnancies.

The following week a cry went out from the Christian community. Flyers were distributed and the Melbourne Police force was sent a clear message that we would continue to preach, pray and counsel where we always have and that they would have to arrest us on public property for practicing our faith. The weekly Friday night rally on February 12th was addressed by Pastor Flip Benham from Dallas, TX, who encouraged the crowd to stand for Christ and the children the next day. Pastor Benham spent 19 days in jail this summer for preaching on a public sidewalk in Houston. Many people came forward to commit to "take back the land."

When the Church arrived at the killing center the next Saturday, the barricades were removed – for the most part. There was still one area that the counsellors had always used to give literature to incoming cars that was roped off. The sidewalk counsellors stood where they have always stood and two of them were arrested. There was an immediate reaction from any local Christians who went across to the barricades and stood on the spot where the sidewalk counselors were arrested. The police department re-thought the situation and "un-

arrested" the sidewalk counselors. The final barricades were finally removed!

Thank God for the courage of the precious sidewalk counsellors who were willing to stand in the gap for the children, despite the threat of arrests. Rallies continue every Friday. Please contact 407-259-9557 for

---

FLORIDA IMPACT
LADIES LUNCHEON WITH DR. BEVERLY MCMILLAN
FORMER ABORTIONIST/PRO-LIFE ACTIVIST

■

Friday, February 26 at 12:00 noon at Sweetwaters Restaurant 465 S. Wickham Road, Melbourne

■

Donation $8.00
For further information: 407-259-9557

. . . And a child shall lead them

Matthew's parents weren't sure if they should bring him to a pro-life rally or not. They thought he might be overwhelmed, and they feared that the worship might be too "charismatic" for him. Matthew came to the third IMPACT rally and was moved to tears. During the praise and worship Matthew raised his hands to the Lord. When the offering plates were passed, he told his mom that she didn't put enough money in. When the call was given to come out and pray in front of the killing center the next morning, Matthew insisted that the whole family go, for

their first experience in direct action. Praise God for Christian families standing up together.

Randall Terry is Coming to Florida

Randy is America's most loved and hated pro-life leader. He pioneered the modern rescue movement with a call to the Body of Christ to repent from sins of omission. Randy is host of the controversial radio program "Randall Terry Live." Although he is best known for his pro-life work, he biblically confronts all the critical issues of our day with clarity, energy and wit. He will be in **Port St. Lucie on Thursday, March 4th at Morningside Church, 2180 SE Morningside Blvd. at 7:30 pm, in Melbourne on Friday March 5th for the weekly IMPACT rally** (location to be announced) **and in Orlando on March 6th at the First Wesleyan Church, 1665 N. Chickasaw Trail.** Contact 407-259-9557 for further information.

This newsletter is dedicated to babies of Florida and their moms. May it serve you in some way.

PLAINTIFF'S EXHIBIT P5

Videotape of Activities
at Aware Woman Clinic
3/6/93 and 2/20/93

[This Exhibit has been lodged separately with the clerk.]

LAST QUARTER PRAYER SERVICES

9:30 Saturday Mornings — rain or shine

October

31 Women's Medical Center, WMC, 680 Hwy 434, Winter Springs

November

7 EPOCH, 609 Virginia Drive, Orlando

14 Birth Control Center, BCC, 1030 Herman Avenue, Orlando

21 Women's Health Organization, 1700 W. Colonial, Orlando

28 WMC

December

5 EPOCH

12 BCC

19 WHO

26 WMC

RESCUING AMERICA'S FUTURE—TODAY THROUGH PRAYER AND DIRECT ACTION

Rescue America
2000 N.E. 51st Place
Ocala, Florida 34479

REV. ED MARTIN
Executive Director
(904) 629-5553

through prayer and direct action.

Pre-born children, over 4500 daily, are dying throughout our country. We believe that their birthmothers are also unknowingly the victims of abortion. The child she carries in her womb is not merely a choice; but a flesh and blood human being deserving of life. The taking of this innocent life will leave a permanent scar with the mother. As Christians, we must try to save as many as we can from this horrible atrocity known as abortion. So we offer all the assistance necessary to help the mother sustain her baby's life.

We follow the Biblical mandate, 2 Chronicles 7:14, "If the people who are called by my name will humble themselves and pray, seek my face and turn from their wicked ways, I will hear from Heaven, I will forgive them of their sins and I will heal their land."

Literally, to humble ouselves means to kneel, repent, sacrifice and to make ouselves lowly for the glory of God. RESCUE AMERICA does this weekly with our presence at the abortion clinics. On behalf of Jesus Christ, we are pleading for "the least of these", our tiny preborn brothers and sisters, by showing concern and compassion to their birthmothers.

On November of 1990, we initiated prayer services in front of the clinics. For the past two years, we have been praying and petitioning God to heal our land. And miraculous things began to happen. Our sidewalk counselors have found the birthmothers are easier to talk with. Graciously, our God is providing more and more people to help save the babies, and with the increase of Christians praying in front of the abortion chambers, more children are being saved.

The only one who can save our country from abortion is our Lord and Savior, Jesus Christ. It is to Him that we give all the honor and praise for each life saved. As to the Scripture, "...turn from your wicked ways", we believe He meant, "discard the apathy evident in the Christian Church today". To fight abortion demands more than just a stand for Holines--we are waging war in the spiritual realm.

We accomplish this in four ways: First, through the solemn prayer services. Each week a group of Christians gather at a different abortion clinic and pray. More churches are signing on to take a Saturday service each quarter, asking their congregations to take part. If each Life Chain church would answer this call, every abortion clinic would have a prayer cover during business hours.

Secondly, those who hold signs--not as picketers or protesters--but to save babies' lives outside the abortion clinics can have an impact--holding your *"Abortion Kills Children"* or any similar sign may touch a mother's heart, and change her plans to kill her baby. (In addition, many Christians have carried signs, protesting at abortionists' practices, homes and hospitals--this is very effective! Physicians do not want their "secret" livelihoods exposed, and will yield to pressure.)

sidewalk counselors, and their prayer partners, men and women who try to engage the moms and dads in conversation, offering literature giving information on crisis pregnancy centers, the development of the pre-born baby, the possible complications of abortion, and testimonies of women who carried their babies to term.

All of the above forms of direct action are legal and done within the framework of the law. If pastors would lead their congregations to the frontlines, the numbers would be overwhelming, and the fourth method, the rescue, would be unnecessary.

The fourth and most misunderstood aspect of baby-saving in front of the clinic is the actual rescue. The term rescue refers to blockikng access to the entrance of abortion clinics. In this manner, we are putting our bodies between the abortionist and his intended victim, the preborn child. While we are in place, there are no babies murdered. This buys time for our sidewalk counselors to talk with the birthmothers. In most cases, the clinic is shut for the day. Many appointments do not reschedule.

Most of the time, rescues result in risk of arrest. Arrests may result in jail time. RESCUE AMERICA feels that we are not breaking the law, but obeying both God's law and man's law. In both the federal law and in all fifty state laws, there is a clause which provides that when a person is in danger of dying, we not only have the right, but the duty to save that person. The Law of Necessity counters the Law of Trespass. The Commandment, "Thou shall not kill", has never been cancelled.

Those who rescue, do so out of deep conviction, feeling God's call to "lay down our life for our friend". For four years there has not been an Orlando rescue--He has used our obedience and commitment in other ways, but we do not presume that it will always be so. Prayer is the mainstay of rescuers who must sacrifice in this way to save another's life.

RESCUE AMERICA mails a newsletter monthly which carries pro-life happenings of the previous month, both locally and nationally, upcoming events, and a letter of encouragment.

RESCUE AMERICA has no paid staff, no office, and little overhead. We are all volunteers, missionaries to the preborn child--an outreach of Christ's Church in the battle to save lives.

RESCUE AMERICA is a not-for-profit organization, but we are not tax exempt. All our funds come from our supporters; we receive no grants from any group, organization or church. We are dependent on those who love the babies and feel compelled to give as the Lord Jesus leads them.

REMEMBER, YOUR PRESENCE AT AN ABORTION CLINIC WILL ALWAYS SAVE A BABY'S LIFE.

August 6-16, the RA team will join with the Pro-Life Action Network for their annual conference in Denver. It will coincide with the visit of Pope John Paul and 20,000 young Internationals.

SIDEWALK COUNSELOR'S CORNER: Just before presstime, we "cornered" John Santoro. John has left his state job and exploring new opportunities to use his legal background and work experience. Meanwhile he is making his presence felt outside the local abortuaries every chance he gets. Caught him this rainy morning heading to WMC in Winter Springs to sidewalk counsel. Many of you know John for his faithful, weekly leading of the rotating prayer services. Others of you have witnessed him handing out tracts on salvation as street people pass by WHO on Colonial Dr. We asked him if he had a "save" testimony for this week. He responded gladly—here's one: "Last Wednesday, we spoke with a couple outside EPOC. The man, a Moslem, allowed me to witness to him that Jesus was more than prophet. I shared that Jesus is the Savior of the world while Carol spoke with his girl friend. The girl friend claimed she was there for a pregnancy test. We gave them literature on the crisis pregnancy centers. They entered EPOC, then exited shortly. The birthmother went to a nearby pay phone and made a call. Then they left and went to a CPC. We had another [illegible] experience the same morning, but this is a save we are sure of." Thank God [illegible] CPC brochures being supplied to us. John shares this scripture, 1 John 3:18: "My little children, let us not love in word, neither in tongue; but in deed and in truth." John certainly lives this!

RANDALL TERRY IS COMING TO FLORIDA: He will be in Orlando on March 6th at the First Wesleyan Church, 1665 N. Chickasaw Trail at 7:00. Randall pioneered the modern rescue movement with a call to the Body of Christ to repent from sins of commission. He biblically confronts the critical issues of our day with clarity, energy and wit. DON'T MISS HEARING ONE OF AMERICA'S MOST CONTROVERSIAL FIGURES.

MARCH PRAYER SERVICE
9:30 SATURDAY MORNINGS - RAIN OR SHINE

March 6	Birth Control Center, BCC, 1099 Herman Avenue, Orlando
13	Women's Health Organization, 1700 W. Colonial, Orlando Led by Dr. Vaughan Stanley, Orangewood Presbyterian Church
20	EPOC, 609 Virginia Drive, Orlando
27	BCC

[illegible] thanks to the efforts of consistent and prayerful support of our RA volunteers, Women's Medical Center, WMC at 680 Hwy 434, Winter Springs, Monthrose, owner and abortionist, has stopped killing babies on Saturday mornings. As Ed Martin has predicted, if we can get the numbers of Christians coming out to pray, we can shut the abortion mills down.

Monthrose is still busy five days a week. We would like to initiate Friday morning prayer services at WMC. Would you call John if you would like to participate. #291-9787. YOU DO MAKE A DIFFERENCE.

SIDEWALK COUNSELERS MEETING: Training, literature, fellowship, testimonies, prayer, with leader, Mary Kennedy. March 8, 7PM-9PM, Call Rose for directions, 895-1803 or 330-1672.

RESCUE AMERICA'S MONTHLY MEETING: March 18, 7PM at First Baptist Church of Winter Park, New York Avenue. Call Judy for information, 293-3845. Come to learn and go to serve. WE NEED YOU!!!

RESCUE AMERICA LIFELINE - PH# 263-5966

PLAINTIFF'S EXHIBIT
8
91-2811CA
3/22/93

PLAINTIFF'S EXHIBIT
CCC
91-2811CA

2000 N.E. 51st Place
Ocala, Florida 34479

REV. ED MARTIN
Executive Director
(904) 629-5553

3/06/93
First Wesleyan

Dear Pro-Life Friends, March 1993

Greetings in the Name of the Lord Jesus Christ!

The old saying, "THE BEST DEFENSE IS A GOOD OFFENSE," certainly applies to the Pro-Life Movement. The Clinton administration and the pro-death people have instituted an all-out attack on the sanctity of human life. NOW IS NOT THE TIME TO RETREAT! NOW IS THE TIME TO MAKE A TACTICAL ATTACK RIGHT TO THE HEART OF THE BABY KILLING INDUSTRY, THE DEATH CENTER ITSELF.

1993 will be a year of intense baby-saving activities on the part of Rescue America. We have developed a plan to involve the Church of Jesus Christ in spiritual warfare. Massive prayer services will take place across America and across the world at the death camps for the children. Tens of thousands of children worldwide will be spared if we are able to make ourselves heard.

I have never pulled any punches with you. We do not employ slick fund raisers that take a large percentage of your money for writing a letter. I am going to ask you from my heart to join with us in this huge task God has given. Honestly, without your help, this plan will not work.

The plan is simple. We must recruit more Christians to take direct action to save babies' lives. Each child we save from death is the end of one abortion, but I must tell you—WE WILL NEVER END ALL ABORTIONS. Even if the law is changed in our favor, abortions will still take place. Christians must be there to show the birthmothers, someone in the community truly cares and wants to help them.

Informing the Church is the difficult part. I believe thousands of believers would be willing to go to the clinics each week if they only knew the truth. But how do we reach them? How do we deliver our message?

We are looking into taking out ads in the leading Christian magazines and newspapers. The ads will focus on saving babies' lives at the abortion clinics. We will provide some kind of special offer to those who call or write in for information. We have the most extensive list of pro-life leaders throughout the United States, and throughout the world. When Christians contact us, we will be able to refer them to a pro-life leader in their own area.

These ads will be very expensive to produce and run. One leading Christian magazine costs over $5,000 for a full page ad, but it reaches over one million people—mostly pro-life.

At the present time, we are planning a how-to manual to save babies' lives at abortion clinics. It will include all aspects of direct action such as setting up prayer services, getting the pastors involved, holding rallies, sidewalk counseling, etc. The cost

This year, a team from Rescue America will travel throughout the United States and Canada, setting up prayer services and rescues. We will depart for England, Scotland, Ireland and France later this spring to rescue and speak to protestant pastors in those countries about the need to involve their churches in saving babies' lives.

Father Rick Walsh has credited RA's baby-saving team for putting the fire under the pro-life movement in Puerto Rico. He also said we did more in four days to bring the Protestant and Catholic Churches together than had ever been done before in Puerto Rican history.

We must have your help. These are only a few of the many exciting projects being put together for RA this year. You can see, we are not content with sitting around and holding meetings, or talking about what to do, but we are taking the battle to the frontlines.

I , of you wonder why you should help children you never met or will never know. It is my belief that God will not bless America as long as baby killing continues unchecked. ABORTION IS MURDER!!! Violence, drugs, child abuse, pornography, and a poor economy will continue as long as we give permission for the murder of unborn children in our country. (We do that when we do nothing.) Indeed, child sacrifice is the crowning piece of the same moral deficiency and depravity responsible for all crimes against mankind.

Christians will begin to suffer shortly—our children and grandchildren are at risk—we must do something to secure their future. Consider your gift to this ministry as a safeguard for their very lives.

Please share with us in this venture. Anyone of you familiar with our work, know we are not idle. Our reputation confirms we will do what we say. WE DO NOT ASK FOR OURSELVES...WE ASK FOR THE LITTLE ONES. Please consider a sacrificial gift to jump start one of these programs—you may designate your preference. But we must also have ongoing monthly support, raising over $5,000 in monthly pledges to keep the programs active.

HOW MUCH IS A HUMAN LIFE WORTH? We cannot name a monetary value. We have over 1,300 individuals receiving our newsletter. If each sent five or ten dollars monthly, our needs would be met. You just don't know how difficult it is for me to write a letter asking for dollars—but the need is so critical. I hope to hear from each of you on the mailing list this month.

Please pray earnestly that our Lord will guide you. He loves a cheerful giver—what could possibly give you greater joy than saving a baby's life? ("How can I repay the Lord for all his goodness to me?" Psalm 116:12).
Thank you so much for all your continued help. I know God will have a special blessing for those who answer with their hearts!

Love for Life,

Ed Martin

EULOGY FOR THREE CHILDREN (The following was read by Rev. Ed Martin at the Memorial and Burial Service for three aborted babies on February 6, 1993:
"As of today, September 23, 1992, my wife, Linda, and I have three new children. I feel that God has given these children to our family through a spiritual form of adoption. The three were found in a dumpster outside an abortion clinic in Washington, D. kept their bodies intact.

Today, while standing outside the All Women's Health Center in Gainesville, I felt the Lord asking me to spiritually adopt these children as my own. He gave me their full names, the ones He wanted for them. "Now the word of the Lord came to me saying, 'Before I formed you in the womb, I knew you, and before you were born, I consecrated you; I have appointed you a prophet to the nations.' (Jeremiah 1:4-5.)

Please, let me now tell you about our three new children.

Baby Steven Donald. Baby Stevie and I have traveled throughout the country together. He is a perfectly formed little boy who was killed through abortion at the age of 12 weeks in utero. He may have been a sports figure as he looks like he is throwing some type of ball. Poor Stevie went through much pain when he was killed in that clinic in Washington, D. C., for you see, his mouth is open in a scream, and his little tongue is hanging out.

The Lord has named him Stephen Donald Martin after the man who first led the rescue movement in Central Florida—Steve Utsler, and Donald Treshman—the founder of the rescue movement in Texas and my partner in Rescue America.

It is time to bury Stevie. The chemicals are no longer working, and his beautiful, pink body is now black and the only thing that you can distinguish is that fine strong hand, reaching toward heaven.

Baby Judith Joan Martin. Baby Judy is also beautiful. Her body, a little more transparent than Stevie's, but you can distinguish her features, and that she is a girl. Baby Judy also traveled with me, and her little torn body was used by the Lord to convince people to save other little children.

Judith Joan is named after Judy Madeen, the current rescue and activist leader in the Central Florida area, and Joan Reilly, the fiery redhead from Ocala who first informed me about the Pro-life movement, and how to save babies.

Baby Lawrence Michael Martin. Baby Larry is the least distinguishable of the three children. His body was so torn up by the forceps that it is hard to tell if he is a boy or girl. Baby Larry has stayed in his resting place in my home for the full three years.

Baby Lawrence Michael is named after one of the most faithful pro-lifers in all of Central Florida, and one of the least known. Larry Schmitz has stood his faithful watch at the back entrance to "The Women's Health Organization" for as long as I can remember. His faithfulness has saved thousands of children the horrors of an abortion death, and also saved their moms the pain of killing their children. Another longtime faithful friend and little known pro-lifer is Michael Hamblin—the father of eight children. Mike has stood guard over abortion clinics since the late seventies. His determination has brought many Christians into the pro-life movement, and he has also saved many children and their moms the pains of abortion.

Over the past three years, these children have become as close to me as my own three natural children. Sometimes, I find myself talking to their torn broken bodies, asking them to forgive me of my years of apathy and fear. I know their spirits are home with our Lord, and they have no more worries and troubles. But they are my children and I will continue to weep over their senseless killings, and the senseless killings of over thirty million of their brothers and sisters.

Please, now in your own heart, reflect on their short life and death. Over the past three years, these small bodies have touched many lives, and I know have saved many children. If someone had been to this clinic in Washington, D. C. to hold a sign or to talk to them about the help that was available to their moms in the Christian Community, or to just stand there and pray, then perhaps—just perhaps—their moms would have walked away from this killing place and we would not be here to cry over them.

It is good to weep, it is good to cry, it is good to feel sorrow, it is good to even feel outrage. But we must come away from this with the understanding that each of us is in a small way responsible for their death. The Church of Jesus Christ

children.

STEPHEN DONALD, JUDITH JOAN, LAWRENCE MICHAEL: Your mother, brothers, sisters, the millions of pro-lifers and your father now release your body to be buried. And even though we did not know you in this life, we truly love you. As Christians, we have that eternal promise of seeing you and spending eternity with you and our Lord Jesus Christ."

"WE WON IN VOLUSIA!!!" began the letter addressed to Ed Martin, Shirley Hobbs and Judy Madeen. Chris Weiss, attorney for the three defendants advised them that Judge William Johnson, Circuit Court Judge for Volusia County denied The Women's Health Center, Inc. and Family Planning, Inc's motion for a permanent injunction and quashed the temporary injunction. This decision came five days after the U.S. Supreme Court handed down the decision ruling against the pro-aborts in the Bray v. Alexandria Women's Health Clinic. (which means pro-life has defeated the attempt of NOW to have the federal courts condemn the pro-life movement as "anti-women" and "anti-civil rights.") ***WARNING—Our victories are often short-lived. The pro-aborts are appealing Judge Johnson's ruling.*** ***WARNING—Both in the Congress and in the Florida House, bills have been introduced to to provide criminal acts and penalties for disruption of certain lawful activities re: medical facilities. House Bill #1429. It's targeting "protests by pro-lifers outside abortion clinics, ie., sidewalk counseling, picketing, praying and rescuing. CALL YOUR CONGRESSMEN AND SENATORS—US & State. Ask your pro-life elected official for a listing of bills of interest to pro-family people, which includes some dangerous bills in committee—granting special status based on sexual orientation, condom distribution, and funding for feminist radical agenda.

STATE, NATIONAL AND INTERNATIONAL NEWS

Dateline Puerto Rico: Rescue Puerto Rico and RA went on trial Feb. 4 for RICO suits filed against them by local abortion clinic owners and a coalition of pro-death and sodomite forces. Their purpose is to fabricate a link between and the Catholic Church on the island and RA. All the defendants except Ed Martin were represented by local attorneys; Ed defended himself and RA in the federal trial. The highpoint of the trial was when Ed pressured the head of the ungodly coalition to admit that they believed in sex with children by adults as long as the child said it was OK. This included incest, homosexuality, and child pornography. The trial was postponed for a few months at the discretion of the judge to give both sides time to prepare. Please continue to pray for the situation in Puerto Rico. Father Walsh has come under a great attack for his stand for the unborn.

Dateline Gainesville, Florida: The Right to Life office was firebombed February 12. Someone tried to throw a firebomb through the front window of the RTL office. It blew up at the front door, and damage was minimal. At the same time this happened, Gainesville RTL was preparing to hold a banquet a few blocks away. As the eighty plus guests arrived, they had to make their way through over fifty screaming pro-aborts.

MISSIONARIES' JOURNEYS OF RA CONTINUE—
March 13-18, Rev. Ed Martin will join with Joan Andrews Bell for a speaking tour of New York, New Jersey, and Delaware.
March 28-April 14, the RA team will travel to England, Scotland, France and Ireland. The team will stage rescues and speak to various groups and churches on pro-life activism.
April 16-19, Rev. Martin will lead rallies and prayer services throughout the eastern section of Texas.
May 6-15, Rev. Martin will speak throughout the central section of Canada on Rescue and direct action. Mid-June the RA team will lead a rescue in the Central

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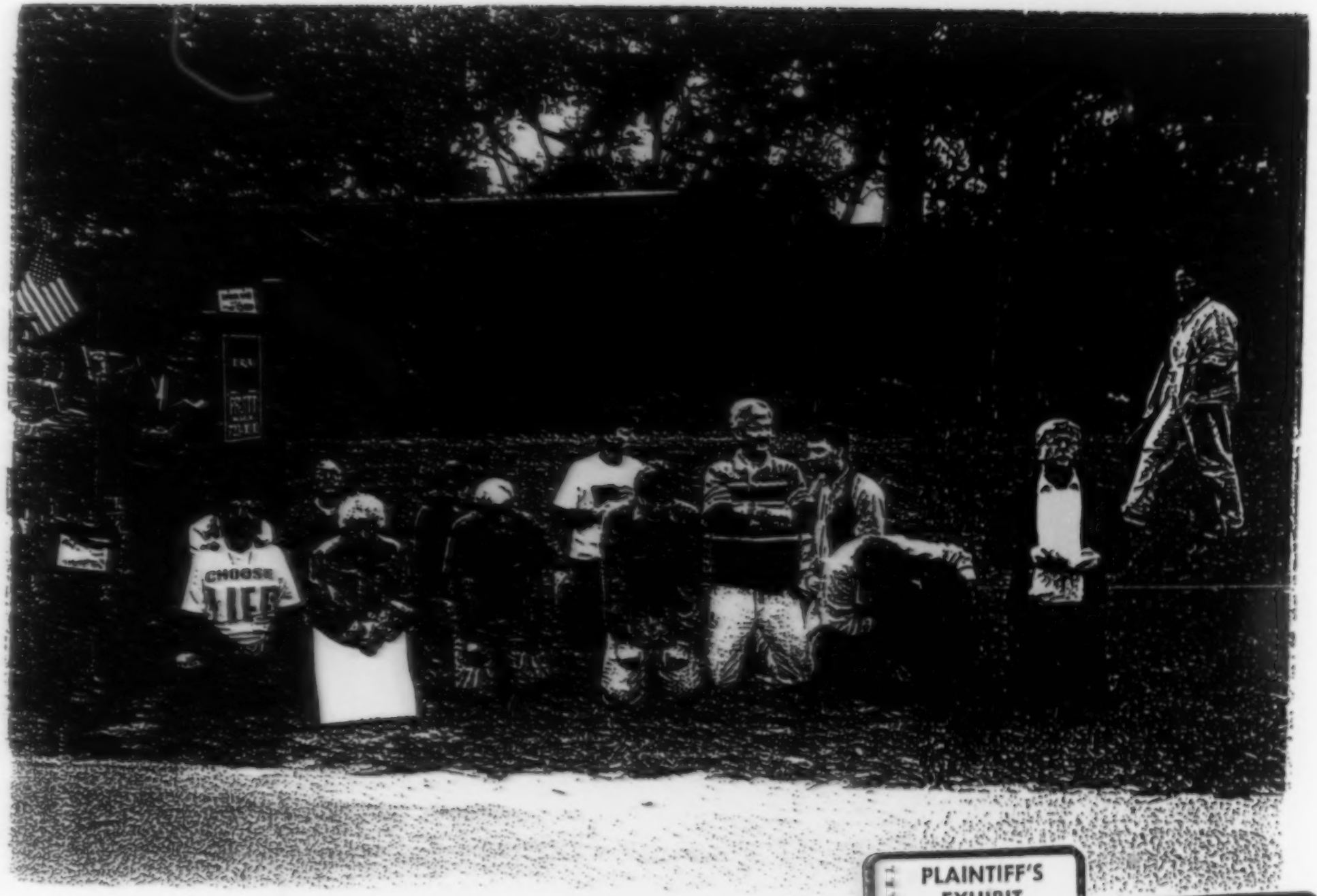

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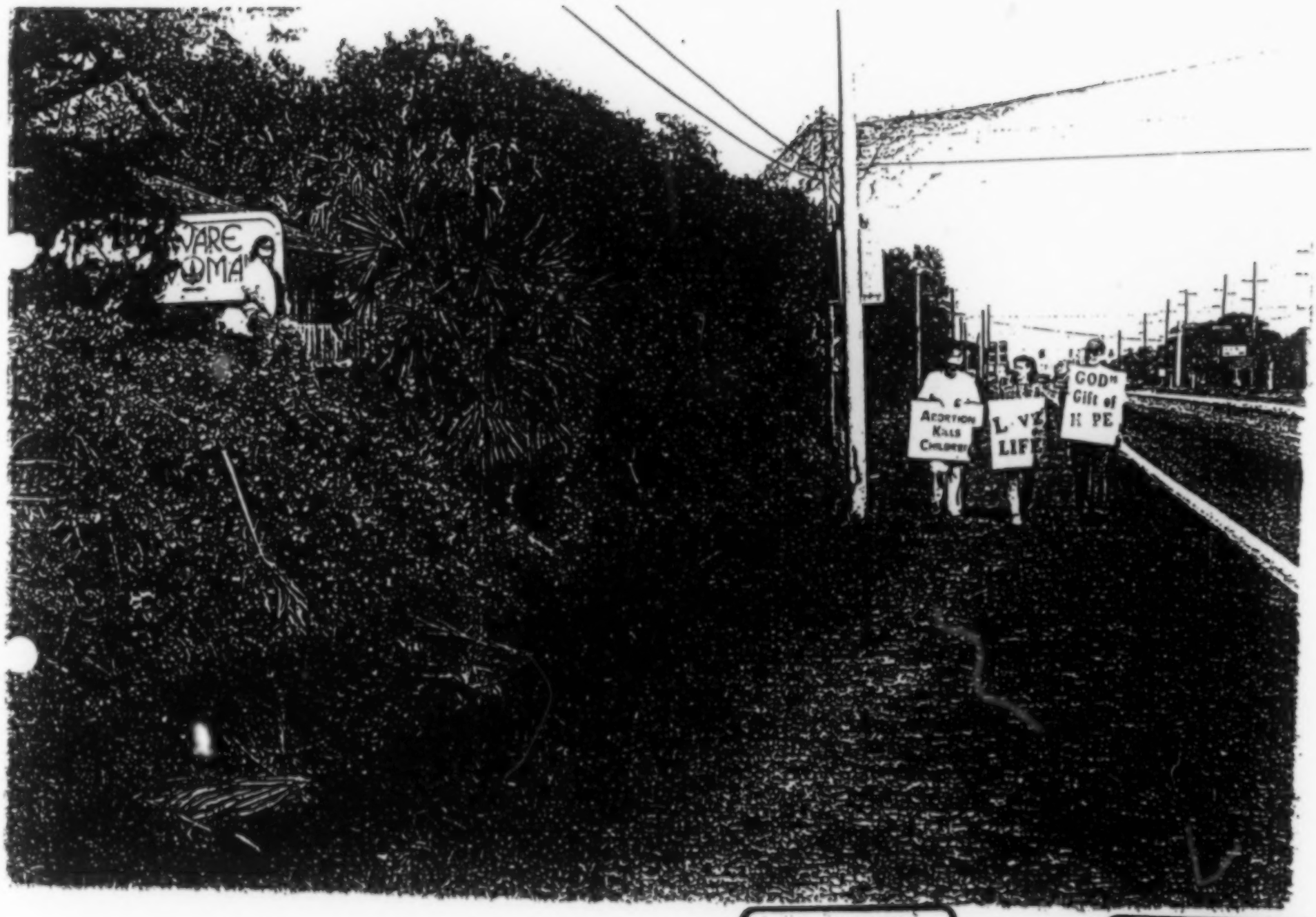

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NATIONAL OPERATION RESCUE

FLORIDA I.M.P.A.C.T.

March 27, 1993

Dear Friend:

Greetings in the Jesus' Name!

We have been through a whirlwind in the last two weeks. We are being attacked by the media as a result of the tragic shooting of David Gunn. We have been flooded with media interviews; Time, Newsweek, New York Times, L.A. Times, ABC, CBS, NBC, CNN, London Telegraph, two live Today show appearances, all here in Melbourne. That's not to mention hundreds of local and state interviews.

Operation Rescue National has always promoted non-violence, and has a rich history of peaceful intervention. The man who shot the abortionist in Pensacola has never even been to a rescue event, but the media has attacked us viciously and repeatedly.

We're being attacked in the courts. Central Florida abortionists are trying to prove that Bruce Cadle and others are guilty of contempt of an injunction they have never violated. Aware Woman's employees are lying under oath, and the judge is allowing it. The killing industry in Central Florida has brought in all the resources of the national feminist arsenal to try and stop the local lifesaving activities.

We're being attacked in the legislature. The state of Florida is trying to outlaw any attempts by Christians to save babies lives at abortion mills. They are, in fact, trying to remove the First Amendment rights of pro-lifers, simply because of what they believe.

Here's the good news! Our Lord and Saviour Jesus Christ said that the gates of hell will not prevail against the Church! When Jesus talked about hell in scripture He used the word Gehenna. Jesus was referring to an actual place, in the valley of Hinnom, where children were sacrificed.

Today, children are sacrificed inside abortion mills. The reason the Church is not prevailing against the gates of hell is because we are not going to the gates of hell. We know where they are killing babies, we know when they are killing babies, and we even know who is killing them. But we tend to look for any excuse in the world not to go intervene on behalf of the children.

Jesus said "Do unto others as you would have others do unto you." If you were being dragged against your will to be executed – even though you had committed no crime – what would you want done on your behalf?

Jesus commands us to "Love our neighbor as ourselves." He also said, "No greater love has a man than this, to lay down his life for his friends."

We reflect on Jesus laying down His life for us as Holy Week approaches. If He had not been willing to die for us, we would not have eternal life. Is there a better way to show our appreciation to our Lord than to follow

His example? He told us, "To deny ourselves, take up our cross, and follow Him."

Precious little babies, created by God, are scheduled to be killed during Holy Week. Please join us to speak up for those who cannot speak for themselves during this sacred time. We need men, women, and children from all over Florida, to come together and stand up for righteousness.

Please join your brothers and sisters from around the state at the rallies to pray, worship, and then go forth to take the love of Jesus to the very gates of hell. Rallies will be held on April 8 & 9, 1993 at 7:00 pm at Our Lady of Lourdes Church. The church is located at the corner of Oak and Fee Ave. in Melbourne. If you have questions, feel free to call the office at 407-259-9557. There will be child-saving activities all across Florida on April 10. Join in during Holy Week and bring your family. The next generation of Floridians needs you to take a stand for them.

Your financial help is needed to help this event go forward. Our enemy is well funded, and we need to be equipped to stand against their attacks. Please send a sacrificial gift today to help during the challenging days ahead. And please, PRAY! PRAY! PRAY!

I look forward to seeing you during Holy Week and please give as large a gift as you can as soon as possible!

In the Master's Service,

/s/ Keith
Keith Tucci
Executive Director
Operation Rescue National

I will follow the example that Jesus gave us. I believe that the children and their mothers are worth my time and resources.

_I will participate in Holy Week activities.

_Enclosed is my gift of ___ to help ORN during this critical time.

Florence Andrus
1916 Hillmoor Dr. #77
Fort Pierce, FL 34952

HOLY WEEK
FLORIDA 1993

"RESCUE THOSE WHO ARE UNJUSTLY SENTENCED TO DEATH, DON'T STAND BACK AND LET THEM DIE! *IF YOU SAY YOU DIDN'T KNOW THIS, DOES NOT THE GOD WHO KNOWS YOUR HEART KNOW THAT YOU KNEW, AND JUDGE YOU ACCORDINGLY"*
PROVERBS 24:11-12

Join Christians from all across Florida to stand up for the pre-born babies who are scheduled to be killed!

Rallies to be held

Thursday April 8th at 7:00 pm
at
Covenant Presbyterian
(Please note that this is different from enclosed letter and is correct)
720 Emerson Drive in Palm Bay
and
Friday April 9th at 7:00 pm
at
Our Lady of Lourdes Church
On the corner of Oak and Fee in Melbourne

Child-Saving Activities

Saturday April 10, 1993
All Across the state of Florida!
Times and locations to be announced!

For further information contact:

Operation Rescue National at 407-259-9557

[p. 1] IN THE CIRCUIT COURT OF THE EIGHTEENTH JUDICIAL CIRCUIT IN AND FOR SEMINOLE COUNTY, FLORIDA

WOMEN'S HEALTH CENTER, INC., AWARE WOMAN CENTER FOR CHOICE, INC., EPOC CLINIC, INC., AND CENTRAL FLORIDA WOMEN'S HEALTH ORGANIZATION, INC.,	]	CASE NO. 91-2811-CA
Petitioners,	]	
vs.	]	
OPERATION RESCUE, OPERATION RESCUE AMERICA, OPERATION GOLIATH, ED MARTIN, BRUCE CADLE, PAT MAHONEY, RANDALL TERRY, JUDY MADSEN, AND SHIRLEY HOBBS,	]	
Respondents.	]	

BEFORE THE HONORABLE
ROBERT B. MCGREGOR
JUDGE OF THE COURT

A hearing in the above style [sic] cause was held at 1:30 o'clock p. m., on Monday, the 22nd day of March, 1993, in the Courtroom of the Seminole County Courthouse, Sanford, Florida, before Margie L. Breit, Notary Public for the State of Florida at Large.

[p. 2] APPEARANCES:

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Two South Orange Plaza
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Attorney for the Respondents
Martin, Madsen and Hobbs
BY: CHRISTOPER [sic] J. WEISS

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HEARING HELD MARCH 22, 1993

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[p. 4] WHEREUPON:

The following proceedings were had:

THE COURT: This case is styled Women's Health Center, Incoproated [sic], Aware Woman Center for Choice, Incorporated and others as petitioners versus Operation Rescue, Operation Rescue America, Operation Goliath, Ed Martin, Bruce Cadle as respondents. Case number 91-2811-CA.

The Court is in receipt of a motion styled or titled March 1993 Motion Number One, Emergency Motion for Sanctions Against Defendants Who Violated the Court's Order Injunctive Order and also a pleading entitled March 1993 Motion Number Two, Emergency Motion for Modification of Injunctive Order.

The Court is also in receipt of a notice of hearing scheduling these matters for hearing at this time.

Is the Plaintiff ready to proceed?

MR. D'ALEMBERTE: We are, Your Honor.

THE COURT: Is the Defendant ready to proceed?

MR. WEISS: Not fully, Your Honor. I received both pleadings that you just referenced by facsimile copy. I received on March the tenth the first motion number one.

Motion number two I received on March the twenty-second at eleven twenty a. m. by facsimile copy. I don't even have a complete copy of page nine of it.

[p. 5] I don't have any verified copies to show that any of the documents have been verified. Presumptively those are in the Court file.

Before going a whole lot further in it, I would want to invoke the rule of sequestration at this time with respect to all other than the named parties in this cause because I do think they are going to be receiving live testimony here today.

THE COURT: As to everybody or as to those expected to be witnesses?

MR. WEISS: Both my clients intend to testify here today. As to the other parties who have been served with notice that they're going to be subject to sanctions, I believe they're defendants to this cause and the plaintiffs seek you to impose sanctions on them, they certainly have the right to be here and hear what their accusers have to say.

With respect to all other non-parties in this action, that would be anyone other than the plaintiffs, other than the named defendants –

THE COURT: Please, sir, you repeat yourself unnecessarily. All I asked was whether, you know, you

were talking about everyone in the room or just those that will be witnesses.

MR. WEISS: Anyone that will be a witness, Your [p. 6] Honor.

THE COURT: Okay.

MR. D'ALEMBERTE: Your Honor, we have, may it please the Court, my name is Talbot D'Alemberte appearing for the plaintiff. We have no objection to that.

We would ask for one exception, Your Honor, and that is for Captain Gary Alleyer who is a captain on the Melbourne Police Force who we will present to the court as an expert witness.

And, since some of what he would testify to, Your Honor, relates to a video tape and other material to be shown, we respectively submit it would save a great deal of time to allow him to remain in the courtroom. We do intend to qualify him as a police expert, Your Honor.

THE COURT: I don't know. Do you want to counter?

MR. WEISS: I do, Your Honor. We are entitled to hear him fresh from the stand the first time.

THE COURT: Well, frequently an expert witness is called upon to relay opinions based on testimony given by others.

From what you know, why do you believe his testimony will be tainted by what he hears others to say?

MR. WEISS: First of all with respect to who's going to be called today, I have idea, I have no prior

knowledge to his status as an expert, his qualifications [p. 7] as an expert, and what he's expected to opine upon.

And, therefore, without knowing whether or not he really meets the definition of an expert – If he is an expert, then I would agree with the Court. For instance, if he meets the requisite qualifications, then he ought to be entitled to come and hear it.

Without knowing who he is or anything about his educational background or training or experience, if the Court finds him an expert, then that would be appropriate to have him in here. I think it's inappropriate at this time.

THE COURT: Mr. D'Alemberte, will he be in any way a fact witness?

MR. D'ALEMBERTE: Your Honor, honestly he would be a fact witness as well. Yes, sir. There are some things he observed.

If I may just briefly, Your Honor, spell that out. He would – He has been a witness to a number of these episodes, Your Honor. We do have some video tape, pieces of video tapes. I think it's about twenty-seven minutes long.

We thought allowing him here at least while that video tape is being shown would save a good bit of time for the Court. Also he could, I'm not sure he's even seen this video tape. It would allow him to refer to [p. 8] that tape to bring to Your Honor's attention to episodes that have occurred at the clinic.

Since he was also present himself, he would be a factual witness as well, yes, sir.

I can provide something of his background if that would be helpful to counsel.

THE COURT: Well, if you would tell me how you intend to call upon him in his field of expertise. In other words, to fashion –

MR. D'ALEMBERTE: Yes, sir.

THE COURT: – to fashion the relief you seek?

MR. D'ALEMBERTE: Yes, sir. Just to talk about the points of public safety and convenience and what measures would be useful to aid the Melbourne Police Department in providing public safety around this clinic at times.

And, some of that, Your Honor, as I listened to him, struck me as probably opinion. Just to be safe, I wanted to make sure that I got him qualified as an expert.

MR. WEISS: Just by way of rebuttal, Your honor, I do believe from time to time he is a paid employee and security man for the plaintiff in question.

MR. D'ALEMBERTE: If that's true, I certainly have no knowledge of it. That's not true, Your Honor.

MR. WEISS: That's the information relayed to him.

MR. D'ALEMBERTE: That's incorrect.

[p. 9] THE COURT: To the extent that he'll be a fact witness, it would be best that he be subject to the rule.

MR. D'ALEMBERTE: I understand, Your Honor. We'll try to figure out some way not to waste too much time.

THE COURT: Would you please announce your witnesses and have them stand so that I might instruct them on the rule of sequestration.

MR. D'ALEMBERTE: Yes, Your Honor. If I may identify the parties who maybe witnesses, but who are entitled to be here as party representatives.

Your Honor, first of all with me, Your Honor, as counsel is Kathy Patrick who is admitted from Texas by counsel agreement. Susan England counsel is in the courtroom. Jerry Blair, I hope will be here. Scott Rost is here. Tammy Joy is here, and she will help us with exhibits, Your Honor, but she is also representative of one of the parties plaintiff.

THE COURT: Which party?

MS. JOY: The Women's Health Center.

THE COURT: They are not otherwise represented?

MS. JOY: No.

MR. D'ALEMBERTE: And Patricia and Ted Windle, Your Honor, the owners of the Woman's Aware Clinic.

In addition to those Dr. Snydle, Ruth Aric (phonetic).

[p. 10] THE COURT: Are these the witnesses that you plan to call?

MR. D'ALEMBERTE: Yes, sir.

THE COURT: Are they present?

MR. D'ALEMBERTE: Yes, sir.

THE COURT: If you would have them stand and remain standing.

MR. D'ALEMBERTE: Bruce Cadle is a party, Your Honor. So, he's entitled to remain. Meredith Raney I believe is not a party. I don't know if he's in the courtroom. Pam Doyle is a witness. There is another witness also.

MS. PATRICK: Your Honor, there is another witness we would like to call. He is not in the courtroom now. If I see him in the courtroom, I will call him to the Court's attention. He's a tall blond fellow.

MR. CADLE: Your Honor, a document related as a subpoena was dropped at my house. I'm the Defendant Bruce Cadle. Reverend Tucci does not live at my home.

I instructed the man who did not identify himself, but who dropped this document at my house, that he did not live there, has never lived there, was not visiting or staying. He refused to listen. Left this document with a money order. I'm not sure if he knows to be here.

MS. PATRICK: Your Honor, I'm not telling the Court [p. 11] he's under subpoena. I was given to understand Mr. Tucci would be here. I was told that. Whether he shows up or not, I wanted to alert the Court, if he does show up we are going to call him as a witness.

THE COURT: All right. Thank you.

MR. D'ALEMBERTE: I have a copy of a witness list, if I may tender a copy to opposing counsel.

THE COURT: Would the Defendant indicate any witnesses that you may be calling and have them stand.

MR. WEISS: Just parties, Your Honor.

THE COURT: Okay. Thank you. To those of you who are standing, other than Mr. Cadle, who maybe seated, you've been designated as the witnesses for this hearing. And, the Court will require of all witnesses, other than parties, that you remain outside of the courtroom and far enough away so you are unable to hear anything that is said or done within the courtroom except, of course, when you yourself are called to the witness stand to testify.

In addition, from this point forward you are not to discuss the testimony that you will give or the testimony that you have given with any other person.

But, the rule is broader than testimony. You are just not to discuss any part of the case with any other person, including each other.

Do each of you understand those instructions?

[p. 12] All nodding affirmatively. All right. If you would please step from the courtroom at this time. Remain nearby until you are called.

MR. D'ALEMBERTE: Your Honor, may I inquire about your instructions? Counsel will be allowed to, in bringing people in, to let them know what items –

THE COURT: I meant to speak to that exception. I'll clarify it if it becomes necessary.

MR. D'ALEMBERTE: Just as long as counsel is aware of that. Your Honor, would it be helpful to just give a brief opening statement at this time? I just wanted to clarify that.

THE COURT: Yes, please.

MR. D'ALEMBERTE: Your Honor, counsel was really quite correct in his earlier comments about the papers served. In fact, I think he was a little too generous to us about the notice given because I don't think it was March tenth that we actually got the first papers to him. I think he's giving us the benefit of a day or so.

But, the original papers in this case were began last week for this emergency that we hoped to bring to Your Honor's attention came closer and closer upon us.

When we did originally seek a hearing, when Your Honor informed us, we phoned counsel, when I first became involed [sic] at least, we phoned counsel to let counsel know [p. 13] what we'd be planning to do, filings that we'd made both in the appellant court and this court and that we would seek the earliest possible hearing that we could seek.

THE COURT: Let me inquire about that, Mr. D'Alemberte.

MR. D'ALEMBERTE: Yes, sir.

THE COURT: I see a reference to a matter pending in the appellate court. Is that matter still pending?

MR. D'ALEMBERTE: It is, Your Honor. But, I do have, it's nothing but a faxed copy of an order, I believe counsel has also received, if I maybe permitted to show that to you.

It's an order which I think that clears up the problem that worried me. When I first heard there was an appeal pending, I obviously worried about that old metaphysical question about whose [sic] got the file.

Well, as you see, the file is before this court. What happened is the appeal was docketed as a non-final, an appeal from a non-final order. So, the thing that worried me, Your Honor, about the appellate court relinquishing jurisdiction no longer worries me.

Additionally, there is an order by the appellate court. If I may read a portion of that order to the court?

This is upon consideration, the Appellees, March [p. 14] 17, 1993, emergency motion to relinquish jurisdiction. And, it, appearing from a motion and briefs filed in the cause that no stay of permanent injunction being appealed has sought or granted, the lower court has inherent authority to consider the imposition of sanctions for violating the permanent injunction and relinquishment of jurisdiction is unnecessary.

So, I felt some comfort in that, Your Honor. Additionally, I have copies of the notice of appeal and the docketing order signed by, on behalf of Hank Habershaw (phonetic) the clerk. And, it's an acknowledgement of a notice of appeal, non-final. If that would give Your Honor comfort.

THE COURT: I see the same in the court file indicating it was filed – well, the filing date of ten twenty-seven, ninety-two.

MR. D'ALEMBERTE: Yes, sir. And, so the thing that worried me when I filed the motions, because, quite honestly, at the time that we were worried about getting before this court on an emergency basis, I had not actually seen the appellate papers and I –

THE COURT: Other than the order you've just read, the appellate court has not entered any other orders?

MR. D'ALEMBERTE: No, Your Honor. That's all. And, because the appellate court says there's no [p. 15] jurisdictional problem and because the file is here at the courthouse and the appeal is docketed as a non-final appeal, I think we've got metaphysics out of the way for a moment.

THE COURT: Yes. Uh-huh. You may proceed.

MR. D'ALEMBERTE: Your Honor, just briefly now. We are on an emergency hearing.

We filed the first motion, faxing a copy to counsel as soon as we had it completed. That March 1993 first motion asks for sanctions.

Additionally, Your Honor you will see in the last paragraph of that motion a prayer for relief that the court also look to modifying the injunctive order that's been entered before. So, that actually was entered. That actually was filed with the court last week. And –

THE COURT: I was under the impression that your motion one spoke only to enforcement, not to modification. Your motion two was the modification request.

MR. D'ALEMBERTE: Your Honor, any confusion is undoubtedly my fault because if you will in the last paragraph of the motion for sanctions, we asked for a modification as well.

These matters can be separated possibly, Your Honor. But, as we begin to hear what we have by way of [p. 16] sanctions, it occurred to us that in some particulars there may be confusion on the part of the parties defendant. And, we don't think it's very healthy to have that kind of confusion.

And, we, therefore, did seek modification. Indeed, it's in a sentence where the word injunction is misspelled. That may indicate some undue haste in getting those papers to the court.

But, what we filed with the court today and served on counsel only today was an elaboration of that original paragraph. And, in which we actually spell out how we'd like to have modification.

Honestly, we thought seriously about styling the second motion as merely a memorandum, not the kind of modification, but we thought it would be useful for counsel to see what it was we were actually seeking. But, we did seek it in the original motion, Your Honor.

THE COURT: Let me ask opposing counsel. You say having received motion number two at earlier this morning if you –

MR. WEISS: It was faxed to me.

THE COURT: – really weren't feeling yourself prepared to respond to it, is there – misspelled word, is there an emergency to modify as well as an emergency to enforce?

[p. 17] MR. D'ALEMBERTE: Your Honor, we believe so. And, honestly, as we began to hear – as I began to hear the witnesses we will present to you today, you'll find all of this is bound up so closely together, that is both violations, we think very clear violations of existing injunctive orders and the possibility that perhaps some citizens have not entirely understood what we believe is understandable. And, we think having a court order which is very clear and specific will allay the situation, Your Honor.

And, the modification we seek would begin to draw some brighter lines that have been drawn in the injunction before. The reason for that, Your Honor, is there's been considerable change in tactics on the part of the protesters.

And, I do not want to characterize that as any attempt to evade the injunction. But, again public safety and welfare of the people served by these clinics is very much threatened, sir.

THE COURT: Well, I can understand the need for, perhaps an emergency hearing on enforcing an existing injunction. I have a little trouble visualizing the need, I'm certain you will help me visualize it –

MR. D'ALEMBERTE: I hope the witnesses will, Your Honor.

[p. 18] THE COURT: – for modification. But, and I hesitate to impose on opposing counsel the need to respond to a modification when it's so recently came to his attention.

MR. D'ALEMBERTE: He did not get that full motion until this morning, sir. And, a notice he had before that was just that we would seek some modification, but not the details of what we would seek.

THE COURT: Mr. D'Alemberte, I agree in the matter of the injunction bright lines are important so there can be no misunderstanding. But, it would seem to me that in – if the court needs to respond to the emergency motion to enforce the injunction, that within any order I would fashion, I could draw the bright lines that perhaps you seek.

I would like to therefore proceed only on the motion to enforce rather than the motion to modify unless, as we go along, the opposing side consents to such a modification.

MR. WEISS: We do not, Your Honor.

THE COURT: Pardon me?

MR. WEISS: We do not at this point consent.

THE COURT: I understand that. But, you may see a need to do that. And, I don't want to overlook, you know, that possibility if it serves your purpose as well [p. 19] as his.

MR. WEISS: One of the principal concerns is, you have an order that's been outstanding for a great deal of time. It's familiar to the defendants. I want to

make sure that any order that's entered here today, particularly with respect any possibility of sanctions, would be real tough for the defendants to be held in contempt for an order that's being fashioned today, theoretically.

That's my concern. I'm greatly concerned about violation of due process rights, particually [sic] the possibility of being held –

THE COURT: I understand. You've heard my ruling. We will proceed only on the existing matters.

MR. WEISS: Thank you, Your Honor.

MR. D'ALEMBERTE: And, Your Honor, I don't know if it would be helpful to the court and counsel at some point, but I do have copies of injunctions arising in similar contexts in Dade, Broward, and Palm Beach counties. And, if I may give a copy to counsel and a copy to the court for its –

THE COURT: What is its relevance here other are you submitting it as the requested order?

MR. D'ALEMBERTE: No, no, Your Honor. Only to respond to what I thought was Your Honor's suggestion [p. 20] that perhaps in the process of enforcement, entering an order of enforcement, Your Honor may want to fashion that kind of guidelines. I didn't know if it could be of use to you to receive it.

THE COURT: All right.

MR. D'ALEMBERTE: I'll give a copy to counsel. And, if I may just proffer those copies to the court.

Your Honor, with that, I think we're prepared to begin testimony. I just might put on the record, with

counsel's indulgence, and perhaps even with a stipulation, that notice in this case has consisted of a phone call – Would it be fair to say Tuesday? Do you recall?

MR. WEISS: The middle of last week sometime.

MR. D'ALEMBERTE: – in which we discussed the case. And, counsel, was then good enough to agree to the admission of Kathy Patrick.

And, we faxed the first motion asking for an emergency motion on Wednesday. Also mailed those, had the additional first motion faxed and mailed on Thursday evening and also left a phone message.

And, on Friday faxed a letter and also called proposing that we meet earlier today to discuss witnesses, documents and so forth. We were not able to get together. But, we were available both yesterday and [p. 21] today for that kind of discussion.

And, in addition, I mailed, express mailed to all the non – all the parties who have been defaulted in the earlier proceedings. Your Honor, you'll recall some parties who did not respond to the subpoena in the original case and were never represented by counsel so far as I can read the court file. We sent mail directly to them originally by express mail.

In addition to that, co-counsel Kathy Patrick made some reference to give notice to parties in the chronology of a Texas proceedings.

MS. PATRICK: Your Honor, in the proceedings that a similar injunction action that is pending in Harris County, Texas, the Defendants Operation Rescue and Rescue America as well as some of the individual defendants

that we seek here to have held in the contempt of the court's order are parties. They are represented by counsel in Houston.

I called Mr. Catus Kaigle (phonetic) who represents both Operation Rescue and defendants Terry and Mahoney to advise him of the proceedings and also faxed to him a letter advising him of the proceedings, the fact that we were seeking sanctions against his clients and the fact we would seek to modify the injunction.

I made a telephone call to an attorney named Jay [p. 22] Secullo (phonetic), who likewise appeared in the those proceedings for Operation Rescue, left a message on his voice mail, did not get a return call.

I spoke personally with the attorney in Houston who represents Operation – I mean the Defendant Rescue America who advised me that while he was not representing Rescue America in Florida, he would be sure that they knew about the hearings and would pass the papers on to his clients.

THE COURT: Counsel, I appreciate those recitals, but they're here. They're represented by counsel. He's interposed a partial objection and I've honored that. Aren't we ready to proceed?

MR. D'ALEMBERTE: We are, Your Honor.

THE COURT: Counsel, do you agree?

MR. WEISS: Yes, sir, Your Honor.

THE COURT: All right.

MS. PATRICK: We call Dr. Snydle to the stand, please.

THE COURT: Is he outside?

MS. PATRICK: Yes, sir. He is.

WHEREUPON:

FRANK SNYDLE

a witness herein, having first been duly sworn, was examined [p. 23] and testified as follows:

DIRECT-EXAMINATION

BY MS. PATRICK:

Q Would you tell the court your name, please.

A Frank Snydle.

Q Are you a licensed medical doctor?

A Yes, I am.

Q For how long have you been a licensed medical doctor?

A For thirteen years.

THE COURT: Doctor, spell your last name, please.

THE WITNESS: S as in Sam, N as in Nancy, Y, D as in dog, L – E.

THE COURT: All right. Thank you.

Q Where are you employed, Dr. Snydle?

A I have a private practice in Haines City, Florida. And, I'm also medical director at the Central Florida

Women's Health in Orlando, Florida. And, until recently I worked at Aware Woman in Melbourne, Florida.

Q Until how recently did you work at Aware Woman Clinic in Melbourne, Florida?

A This past Thursday.

Q Did you work at the work at the Aware Woman Clinic in Melbourne, Florida providing abortion services to its [p. 24] patients?

A Yes, ma'am.

Q Have you been in attendance at the clinic treating patients on days when the Defendants Operation Rescue and Rescue America have staged demonstrations there?

A Yes, ma'am.

Q Would you describe to the court what you have observed on those days?

MR. WEISS: Your Honor, if I may interpose an objection at this time, to the use of this generic term "Operation Rescue." We have specific named individuals here that sanctions are being sought against.

And, I think that generic reference is not going to cut it with to specific individuals that they're seeking you to hold in contempt.

MS. PATRICK: Your Honor, we also sought contempt against the organizational entities, so the evidence is relevant to that as well.

THE COURT: On my review of the file, I think that's one of the questions that came to mind is what type

of legal entity is Operation Rescue and Operation Rescue America and Operation Goliath?

MS. PATRICK: Your Honor, we will provide evidence to the Court that they are an unincorporated association of individuals. In the case of Operation Rescue, many of [p. 25] them travel the country engaging in ligates.

It is a group of – They do have an organization scheme. They have entity. They are not technically a corporation or partnership, but an unincorporated association of individuals.

THE COURT: What is the ability of the court to enforce its order against a non-legal entity?

MS. PATRICK: The ability of the court to enforce its order against a non – The fact that it's not a corporate form, Your Honor, does not preclude the court from, for example, attaching bank accounts held in the names of Operation Rescue, which exist to my knowledge.

From calling in officers and directors, there are people who call themselves the national director of Operation Rescue.

The Defendant Cadle describes himself as the southeast regional director of Operation Rescue.

Just as with a corporation, the court can enforce the – its orders by commanding the officers who control the entity to take certain steps to correct wrongful acts.

THE COURT: It would seem to me more proper to have individuals named in their representative capacities than non, you know, nonpersons named as a defendant.

MS. PATRICK: Well, Your Honor, Defendant Cadle is [p. 26] named both individually and in his representative capacity as the regional director of Operation Rescue.

Defendant Martin is named both individually and in his capacity –

THE COURT: I understand that. But again it's, you know, the problem is identifying for enforcement purposes, if I grant your motion, a proper legal entity that the court can subsequently deal with if there is violation. And, I have that problem right now.

MS. PATRICK: Yes, sir. Let me see if I can help the court. In other instances, Operation Rescue, as an entity, has been found in comtempt [sic] of court as an entity.

MR. WEISS: Your Honor, I would object at this point. We've got a lawyer who's doing the testifying here. If she wants to climb up on the stand and testify what's happened all over the country, that's fine.

But, my permission to grant her parole – I assume the court is granting her that.

THE COURT: Yes.

MR. WEISS: Is not to get on the stand. And, if she wants to testify, let's call her on the stand.

MS. PATRICK: Your Honor –

THE COURT: Well, I think as an officer of the court, she can describe what – how other courts have solved like problems. And, that's what I'm concerned [p. 27] with.

MS. PATRICK: And, I understand the court's concern. But, think about it in this way. Put aside the issue on which these people are engaged. Think about a labor union, which is an unincorporated association of individuals.

Labor unions as entities can be found in contempt of court. They can be enjoined and orders against them can be enforced.

There are cases that we have provided to the court, older Florida cases in which just that has occurred. That is the unincorporated association has been joined – has been found to be in violation of an order and has been sanctioned.

In terms of the court's –

THE COURT: Counsel, I've not been able to have an opportunity to review those cases. But, if you say Florida solved that problem, fine. Let's go ahead.

MS. PATRICK: All right.

Q Have you observed, Dr. Snydle, members of the Defendant Operation Rescue engaging in demonstrations outside the Aware Woman Clinic on days that you were providing abortion services to patients there?

A Yes, ma'am.

MR. WEISS: Object to the form. First of all, it [p. 28] hasn't been established that he knows who the members of this organization are as such.

THE COURT: Insufficient foundation or predicate at this point.

Q Dr. Snydle, have you, during your practice as an abortion provider in Central Florida, become familiar with persons who identify themselves as members of Operation Rescue?

A Yes, ma'am. And, of Operation Goliath also.

Q Would you tell the court, the names of people you know to be associated with Operation Rescue from your personal observations.

A Bruce Cadle, Ray Unterberger (phonetic), something like that, Meredith Raney, Ed Martin, other names that I can't remember right now, but that I would recognize.

THE COURT: All right. If [sic] would pull the mike over to the center. That's fine.

Q And, on the days that you have been providing abortion services at the clinic, have you seen Bruce Cadle, Meredith Raney, Ed Martin, Roy Unterberger, and others who you know to be associated with Operation Rescue conducting demonstrations at the clinic?

A Yes, ma'am.

MR. WEISS: Your Honor, I think if we are going to sanction, the time frame after the date you entered your [p. 29] order, we're trying to hold these people in

contempt of your order, I think it's important that we establish a time frame.

What may have happened eight, ten years ago is irrelevant here today. It's postentry of your order.

MS. PATRICK: If I could proceed one question at a time, I believe I can tie it up.

THE COURT: If you would, please.

MS. PATRICK: Thank you.

Q You may answer the question. Have you observed those individuals engaging in demonstrations at the Aware Woman Clinic?

A Yes, ma'am.

Q Were those demonstrations after you understood that an injunction had been entered protecting the clinic?

MR. WEISS: Objection, Your Honor. What he understood the date of the order is irrelevant, the date –

THE COURT: That's the next question.

A Yes, ma'am.

Q Okay. Do you have knowledge of when the injunction was granted in favor or the clinic?

A Well, I know that it was several months ago, perhaps up to a year ago. And, I've seen them active as recently as one or two months ago.

Q Would you describe for the court what you have [p. 30] observed the defendants Raney, Cadle, Martin, and others associated with Operation Rescue doing in

front of the Aware Woman Clinic for Choice on days that abortion services are provided there?

A They were there and very vocal, yelling at the patients, yelling at the me [sic], trying to stop cars from entering the clinc [sic] parking lot, including my car.

Q Have you observed them yourself in front of the driveway to the clinic?

A Yes, ma'am.

Q Who did you observe there?

A Mr. Raney, Mr. Cadle, Mr. Unterberger or Unterbarger, whatever his name is.

Q Have you observed that cars attempting to enter the parking lot for the clinic have difficulty negotiating the entrance when those people are blocking the driveway?

A Yes, ma'am.

MR. WEISS: Object to the form. It's leading.

A Yes, ma'am.

THE COURT: Ask him to describe the action.

Q Would you describe what happened to cars that attempted to enter the driveway on days when the demonstrators are there?

A If they see that a car is going to turn in, they usually run up around it and in front of it and try to stop it [p. 31] from entering –

Q Now, Doctor –

A – and try to hand out information through the window, even if the window is closed. They try to push it through the closed window.

Q Doctor, have you had occasion to treat patients who come to the clinic for abortion services after you have observed their cars accosted in that manner?

A Yes, ma'am.

Q Would you describe for the court what you have observed the effect on your patients to be on those occasions?

A Many of them are very anxious. Some of them have physical manifestation of hypertension, cardio arrhythmia, specifically tachy arrhythmia, rapid heart beat.

Q What about their respiration?

A Increased respiration, fear.

Q Do you have an opinion, Doctor, to a reasonable degree of medical certainty as to the cause of those symptoms?

MR. WEISS: Your Honor, I'm going to interpose an objection. We don't have the name of a single patient that we're talking about. We don't have the dates that any of this occurred.

Now, we're going to what is a legal opinion as to the condition of an unnamed person on an unnamed day. I think we're entitled to go into all this.

[p. 32] THE COURT: Yes, but it would be by way of cross-examination, counsel. He has indicated, I

believe, Doctor, you are saying that these are things you observed within the last couple of months?

THE WITNESS: Yes, sir.

THE COURT: That pertains to your response at this time?

THE WITNESS: Yes, sir.

THE COURT: All right.

Q Doctor, so that it's clear, I'm going forward on the basis unless I tell you otherwise, we're talking about your observations during the period after the injunction was entered. Okay?

A Yes, ma'am.

Q All right. Now, do you have an opinion, Doctor, to a reasonable degree of medical certainty as to what has caused the symptoms, the physical symptoms of anxiety you observed in your patients on the date you were providing abortion services?

MR. WEISS: Object to the form, Your Honor. It's improper foundation. That is certainly not grounds for the basis of a professional, a doctor's opinion.

We don't have a patient. We don't have a date. We don't have symptoms. It's just this broad generalization that everybody that walked in there has all these [p. 33] terrible problems.

It's improper foundation.

MS. PATRICK: Your Honor, may I be heard?

THE COURT: Surely.

MS. PATRICK: We have asked Dr. Snydle about patients to whom he was providing abortion services on the days that he observed demonstrators there.

He has already testified to the physical symptoms that he's made manifest.

He is a licensed medical doctor. He has practiced medicine for over nine years. There is no question as to his qualification to provide those opinions.

I think it is important for the court to understand the general effect that a defendants' conduct, for which we seek contempt, has had, so that it can properly fashion a remedy.

THE COURT: Well, you know, the doctor's response is not, you know, pegged to any particular individual. I don't think it needs to be. But, of course, it would be subject to cross-examination as to, you know, specific dates and times.

But, I'm troubled with the aspect of whether we're talking about one out of a hundred or fifty out of a hundred, or whatever the percentage.

MS. PATRICK: I think I can clarify that.

[p. 34] Q Dr. Snydle, would you tell the court what portion of the patients to whom you were providing abortion services at the Aware Woman Clinic exhibited physical symptoms of anxiety on days when demonstrations occurred?

A It would be very difficult for me to estimate that. But, as an example, if I may give an example, we have had several women who have come into the clinic who

have been there previously for gynecological examination who have had normal blood pressure readings. And, then on the day that they came for an abortion, would have very elevated blood pressure readings with no background –

MR. WEISS: If I may –

A – past background –

THE COURT: Doctor, when he stands and makes an objection, you need to stop right then and give him a chance to make the objection.

MR. WEISS: Your Honor, I would like to interpose an objection at this time and move that the testimony be striken [sic] with respect to the words out of his own mouth. The question was what portion of the patients exhibit these symptoms. The answer was that would be difficult for me to estimate.

Everything else beyond that should be stricken as being unresponsive to the question.

THE COURT: Doctor, you have to listen to the [p. 35] specific question and give it a specific answer. If counsel wants further testimony or for you to expand or particularize, let her ask the question, please.

THE WITNESS: Yes, sir, Your Honor.

THE COURT: Sustain the objection. Grant the motion to strike.

MS. PATRICK: Thank you.

Q Dr. Snydle, on how many occasions on days when demonstrations are occurring in front of the clinic

have you had to turn away an abortion patient because the symptoms of anxiety?

A I would say at least one.

MR. WEISS: Your Honor, if I could interpose an objection. The physical symptoms of anxiety are not necessarily in anyway tied to the actions – If a woman decides to kill her own baby, maybe anxious about that, an infinity of actions.

THE COURT: You can cross-examine, counsel. But, that's not the basis of an objection. You may proceed.

Q I believe you were telling the court about one instance in which that occurred.

A Well, it's occurred in more than one instance. But, I would say at least one – It varies. One out of every three days probably that we work with demonstrators there, we will have to send people away. And, some of those women have told [p. 36] me that they are anxious because of the people outside.

MR. WEISS: Objection, Your Honor, hearsay.

MS. PATRICK: Your Honor, a statement in the course of diagnosis –

THE COURT: He can relate what hears from others.

Q I'm sorry. You were saying that some of those patients have told you –

A Yes, ma'am. And, they tell that they have had no history of hypertension. And, in a few cases we have that documented in the charts in the clinic.

Q All right. And, in those instances where patients have no documented history of hypertension and they exhibit phsycial [sic] symptoms of hypertension on the days demonstrations are occurring, do you have an opinion to a reasonable degree of medical certainty as to the cause of the hypertension that your patients exhibit?

MR. WEISS: Objection, Your Honor, no proper foundation.

THE COURT: Well, spell it out.

MR. WEISS: There is no establishment. We're talking about patients in general, none in specific. We don't have any of the charts or any of the medical information.

We're dealing with this hypothetical person on a hypothetical day, possibly one in three. And, now we're [p. 37] rendering a professional medical on an unnamed, undefined patient on an unspecific day.

And, I think there is an improper foundation for him to render that opinion.

THE COURT: Again, those are matters I believe you can explore by cross-examination. But, the court will permit her to proceed. Overruled.

Q Do you have need of the question back, Doctor?

A Yes, ma'am, please.

Q On those days when you have observed physical symptoms of anxiety in abortion patients who report no prior history of hypertension and on those days when demonstrations have been occurring, the patients that

you turn away, the one out of three times I believe you said you had to turn them away, do you have an opinion to a reasonable degree of medical certainty as to the cause of the physical symptoms of anxiety that those patients exhibited?

A Yes, ma'am.

Q What is your opinion?

A I believe that it is because of the protesters around the clinic yelling and screaming at them.

Q And, Doctor, in those patients that you do not have to turn away, but who, nonetheless, exhibit physical symptoms of anxiety, can you tell the Court what effect that has had on their ability to obtain the treatment for which they came to [p. 38] the clinic?

MR. WEISS: Object to the form, Your Honor, leading.

THE COURT: Overruled.

Q You may answer.

A Yes, ma'am. They seem to show more resistance to medical – medicines used as analgesics. And, to help sedate them, it takes a higher level of sedation in those individuals that are more anxious and more disturbed by the people outside.

Q And, what effect does the higher level of sedation have, Doctor, on the level of risk associated with the surgery?

A It increased the risk.

Q Now, Doctor, are you aware of any instances in which an abortion patient has been turned away from the clinic because of demonstraters [sic] blocking the driveway to the clinic who had later come back another day?

A Yes, ma'am.

Q All right. On how many occasions have you become aware that that occurred?

MR. WEISS: Your Honor, I'd interpose an objection. There's no proper predicate as to how he's inside the office, how knows [sic] who's being turned away from the clinic on the outside, unless there's a foundation that he saw them being turned away.

[p. 39] THE WITNESS: I have seen that.

THE COURT: Just a moment, Doctor.

THE WITNESS: All right.

THE COURT: Sustain the objection. Insufficient predicate for it at this point.

Q Have you seen personally, Doctor, some of your patients turned away from the driveway of the clinic by the actions of the protesters whose conduct is at issue here today?

A Yes, ma'am.

Q All right. And, would you tell the court, please, whether when a patient is turned away and forced to come back for a procedure on another day, that likewise can have health consequences for them in connection with their abortion procedure?

MR. WEISS: Object to the form, leading.

THE COURT: Overruled.

A Yes, ma'am.

Q Would you tell the court, please, what the consequences are when a patient is forced to delay a procedure due to the presence of protesters in the driveway?

A Well, if they come back later, they are farther along in the gestation. It becomes, as one proceeds farther and farther into the gestation, the procedure becomes more difficult, more time consuming, greater risk for morbidity and [p. 40] mortality.

Q All right. And, Doctor, in terms of the presence of the demonstraters [sic] in the driveway, blocking ingress and egress, do you have a concern as a medical provider at the clinic about that, the effect of that conduct on the facility's ability to deal with emergency matters?

A If there were an emergency and we had to call in an ambulance, for example, if there's the presence of an eptopic pregnancy or uncontrollable bleeding or whatever happens happens [sic], it would be very difficult for the emergency medical team to get through the blockade.

Q And, what would a delay in the provision of emergency services –

THE COURT: Doctor, have you ever – You're being theoretical I gather. Has that ever happened where an ambulance has sought to come to the premises and been interfered with?

THE WITNESS: Yes, sir. Not in Melbourne, in Orlando.

THE COURT: Go ahead.

Q And, what effect does the delay in the provision of emergency services have on your patients, Doctor?

MR. WEISS: Your Honor, I will interpose an objection. He has just testified it didn't happen in this court's jurisdiction. So, what effect it might have [p. 41] had in another jurisdiction is not the subject of this sanction.

THE COURT: I was concerned that he was speaking theoretically rather than from having observed any. He states he has knowledge of the matter. I'm going to let him testify to that.

Q What effect does the delay of provision of the emergency services, Doctor, have on the patient that requires them?

A It certainly increases the risk.

Q Now, Doctor, have you personally been the subject of harassment by the defendants Bruce Cadle, Meredith Raney, and Ed Martin?

A Yes, ma'am.

Q All right. What I would like to do is have you tell the court about that briefly.

MR. WEISS: Your Honor, I would like to interpose an objection. I want it to meet the dates that this happened. You entered an order. And, I think all this has to be postentry of your order. I think it's irrelevant, the whole line of questioning unless it postdate of the entry of your order. And, I don't think that's been established that he knows the date it was.

MS. PATRICK: The witness has testified, Your Honor, that he thought the injunction was entered some, about a [p. 42] year ago. He's knowledgeable of the entry of the injunction. I have previously instructed the witness to limit his –

THE COURT: Let's fix, if we can, the approximate, the date and place as part of the predicate to the answer.

MS. PATRICK: Your Honor, I was just telling the court what we were going to do next. I haven't asked the witness a question.

THE COURT: Okay. Thank you.

Q Dr. Snydle, what I would like to do is to show you some exhibits and ask you, if you can, whether you have seen these exhibits in the period since the injunction was entered protecting the Aware Woman Clinic. All right?

A Yes, ma'am.

MS. PATRICK: May I approach the witness, Your Honor?

THE COURT: Yes. Counsel, people are coming and going from the courtroom. I'll have to trust to you to let me or the bailiff know if your witnesses are here.

MR. WEISS: It sure would be awful courteous if they'd furnish me a copy since I haven't – I haven't seen any of the exhibits and that they're approaching the witness with. I'd kind of like to see them.

MS. PATRICK: Your Honor, we attempted to confer with counsel on the exhibits. I will certainly show

him [p. 43] the exhibits. But, I think the court needs to understand that we have tried for the last twenty-four hours to confer with counsel and he has been unavailable.

THE COURT: That's what Mr. D'Alemberte said, that you were unable to –

MR. WEISS: Some of us go to church on Sunday.

THE COURT: Pardon.

MR. WEISS: Some of us go to church on Sunday.

MR. D'ALEMBERTE: Not on Monday morning, Your Honor.

MS. PATRICK: That's right.

THE COURT: Some may even go on Monday morning, but that's not – Counsel, if you will, for the record identify the proposed exhibit by whatever number the clerk has put on it.

MS. PATRICK: Yes, sir. We're going to show the witness what has been marked as Plaintiffs' Exhibit M as in Michael, M.

Q All right. Dr. Snydle, since September thirtieth of 1992, have you seen that wanted poster distributed in the Melbourne area about you?

MR. WEISS: Your Honor, she offered that document into evidence. He's testified and that document is not in evidence. I think it's inappropriate.

MS. PATRICK: Your Honor, I think the procedure is I mark the exhibit. I have the witness identify it. And, [p. 44] then I offer it.

THE COURT: Yes. Uh-huh.

Q Can you identify –

THE COURT: It's premature, your objection.

Q Can you identify that wanted poster, Doctor, as a document that you have seen circulating in the area of the Aware Woman Clinic since entry of the injunction September of 1992.

A There are three different wanted posters. And, I believe this is the first one which was probably before the injunction.

Q All right. Have you seen wanted posters similar in type since the entry of the injunction?

A Yes, ma'am.

Q All right. Tell the court then about what those wanted posters, what the effect – what their effect has been on you?

A When I first saw this first, this first wanted poster it was one of incredulity that –

MR. WEISS: Your Honor –

A – anybody could do anything like this legally.

THE COURT: Just a minute, Doctor.

MR. WEISS: I would like to have an objection now. He's testifying about a document that hasn't been

offered into evidence, the effect of a document that [p. 45] hasn't even been introduced yet. I do think it's premature for him to testify about the effect of a document that hasn't been introduced.

And, I would ultimately like to voir dire on this document prior to its being accepted.

THE COURT: Do you seek to admit this document?

MS. PATRICK: No, Your Honor. I'll address, I'm going to ask the witness generally since he has identified this particular document as one that predates the injunction and indicated that there are two others subsequent to the injunction, I'm just going to ask what the effect has been on him of knowing that there are wanted posters circulating with his name on it.

The witness has testified earlier that he has ceased to work at the Aware Woman Clinic. And, this is part of our proof as to the harm that has been sustained by the clinic as a consequence of the overall climate of fear that has been created.

So, I'm not asking the witness to testify to the contents of the document. I'm asking him the effect that it has had on him.

THE COURT: Well, I think the court and the record needs to know what a wanted poster is.

MS. PATRICK: All right. At this point then, Your Honor, I'm going to offer Exhibit MM as an exemplar of [p. 46] the type of poster that has been identified by the witness.

MR. WEISS: May I voir dire briefly?

THE COURT: Yes, sir.

VOIR DIRE EXAMINATION

BY MR. WEISS:

Q Dr. Syndle, why don't you read to the judge who the author of the document is in the lower left hand corner. Who's that?

A Women's Legal Action Coalition, Post Office 362384, Melbourne, Florida, 32936.

Q Okay. Now, is that entity made up of Ed Martin, Judy Madsen, or Shirley Hobbs?

A I don't know, sir.

Q And, that document predates the entry of this court's order involving sanctions and it does not – it has not been circulated by any of these defendants since the entry of the order; correct?

A To the best of my knowledge, no.

MR. WEISS: Okay. Your Honor, I would –

MS. PATRICK: If I can complete the foundation, I can – I'll tie it up. Without regard to his clients, there are other people against whom we are seeking contempt.

[p. 47] THE COURT: Go ahead.

DIRECT-EXAMINATION

CONTINUED BY MS. PATRICK:

Q Dr. Snydle, are you familiar with an organization knows as the Women's Legal Action Coalition?

A Yes, ma'am.

Q Do you know whether any of the people you have identified as affiliated with the Defendant Operation Rescue are likewise the Associated with the Women's Legal Action Coalition?

A I believe Meredith Raney is.

Q All right. Have you seen documents to indicate that?

A I've seen a letter with this letterhead with his signature at the bottom.

MS. PATRICK: All right. Your Honor, then we would offer again Defendants' (sic) Exhibit MM as evidence of conduct undertaken by the defendants. It is as an example only because as counsel has pointed out, it predates the injunction.

The witness has, however, indicated that two other posters similar to this one circulated after the injunction. And so, I think the court needs to understand the generic type of document we're talking [p. 48] about.

MR. WEISS: I have to interpose an objection. It's irrelevant and immaterial. It's not a defendant to this action. This all predates the entry of the sanctions.

They're seeking to hold my clients in contempt of your order.

THE WITNESS: Meredith Raney is –

MR. WEISS: This entity that they're making reference to is not a named defendant in this cause, Your Honor.

MS. PATRICK: Your Honor, Defendant Raney has been identified by the witness as associated with the Defendant Operation Rescue.

We are putting on proof, not only as to counsel's clients but as to others as well. I understand counsel needs to defend his clients, but he's done that. He's pointed out that this document does not pertain to his clients.

That does not preclude me from offering proof as to other defendants.

THE COURT: Doctor, the other two posters that you have referenced to, are they later in time after the injunction?

THE WITNESS: Yes, sir.

THE COURT: And, do they bear a like authorship?

[p. 49] THE WITNESS: Yes, sir. The picture on the very last one is different than the first two, my picture, wanted picture. But, that's about the only difference.

THE COURT: Is the content substantially the same?

THE WITNESS: Yes, sir.

THE COURT: The court will admit it as it relates to the Defendant Raney.

MR. WEISS: All right. I think it's worth explaining Meredith Raney is not a defendant. He has never been served.

THE COURT: I'm sorry. I was under the impression he was.

MS. PATRICK: He is a defendant in the contempt proceeding. He is one of the people against whom we have sought contempt. He's a member of Operation Rescue. He's the entity – the person, one of the people through whom the entity acts, the Defendant Operation Rescue against whom we seek contempt.

THE COURT: . His relationship to that organization is what, please.

MS. PATRICK: It has been testified to by the witness as – the witness has personal knowledge that he's associated with Operation Rescue as are Bruce Cadle, the Unterberger gentleman that he indicated earlier.

MR. WEISS: Your Honor, I don't think there's been a [p. 50] proper predicate that this party knows who this – First of all, Mr. Raney, as you know, is not a named defendant in this cause. It's not been established –

THE COURT: Well, I was mistaken. I thought in opening statement that it was recited that he was. But –

MR. WEISS: I don't see any attempt to serve him either, Your Honor.

THE COURT: All right, now. I'll stand corrected on that.

Counsel, you're saying that he's been in the leadership of Operation Rescue?

MS. PATRICK: Yes. Of the work that they're doing here and an entity called the "Impact Team" as to which we will offer evidence from other witnesses.

THE COURT: Okay. Again, Doctor, what is Raney's relationship to that document?

THE WITNESS: As far as I know he's a member or leader in the Women's Legal Action Coalition. And, that's the people who have promulgated this wanted poster and the other wanted posters.

MR. WEISS: Your Honor, may I just briefly voir dire?

THE COURT: Yes.

VOIR DIRE EXAMINATION

[p. 51] BY MR. WEISS:

Q Mr. – is is [sic] Snydell or Snydle?

A Snydle.

Q Mr. Snydle –

MS. PATRICK: Excuse me, Your Honor, the witness is a medical doctor and if he could please be addressed as a physician.

MR. WEISS: I apologize to the court.

Q Doctor, you of your own personal knowledge and under oath know as a matter of fact that Meredith Raney

is associated with Women's Legal Action Coaltion [sic]? You know that of your own personal knowledge?

A He used letterhead with his signature on the bottom of the letterheads. So, he must want to be associated with them if he's not.

Q I didn't ask you whether – I said do you of your own personal knowledge know if Mr. Raney is associated with Women's Legal Action Coalition and this wanted poster?

A Has he told me that personally?

Q Yes.

A No. He has never told me that personally.

Q And, do you of your own personal knowledge know of any relationship whatsoever between Women's Legal Action Coalition and that Rescue America, my client Ed Martin or Judy Madsen, and Shirley Hobbs?

[p. 52] A I don't know that for a fact. No one has told me that.

MR. WEISS: Your Honor, without a proper foundation I would move that the document not be admitted.

MS. PATRICK: Your Honor, counsel very carefully again limited his questions to his clients. The witness has established a foundation as to the admissibility of the document as to Operation Rescue.

To refresh the court's memory, I'll be happy to ask those questions again if it will be helpful.

THE COURT: Let me clarify it with counsel. You are representing who, please?

MR. WEISS: This gentleman Ed Martin, this lady Judy Madsen, Rescue America, and Shirley Hobbs. And, they're the folks that they're seeking sanctions. I don't think they're seeking sanctions against somebody they haven't served. Mr. Raney has not been served. I don't see what possible relevance this could –

THE COURT: He was present and left the room as a potential witness?

MR. WEISS: No.

MS. PATRICK: Yes, Your Honor.

MR. WEISS: Yes.

MR. CADLE: Your Honor. I'm Bruce Cadle, also a defendant desiring to represent myself in these [p. 53] proceedings.

Meredith Raney did leave the room. He was present. He was called as a witness. He has no knowledge that he is a defendant in these proceedings. He's never been named as a defendant in these proceedings and is waiting outside waiting without counsel and no knowledge that he is a defendant.

This court previously, Your Honor, determined that anyone who is not a named defendant could not be held responsible under these proceedings, under this existing court order and under Judge Hall.

Sheila Eshenberg (phonetic) came to this court. No evidence was allowed to heard against her subject to the

contempt hearing because she was not a named defendant as neither is Meredith Raney.

THE COURT: But, it's being represented to the court that he is within the leadership of –

MS. PATRICK: The defendant Operation Rescue.

THE COURT: – Operation Rescue. To that extent –

MR. CADLE: Not only is that no accurate, Your Honor, but there is no –

THE COURT: I can't deal with that, whether it's accurate or not, it's being represented.

MR. CADLE: Should Mr. Raney get counsel then? He does not know that he is a defendant in these [p. 54] proceedings.

THE COURT: Well, he's not. He personally, apparently, has not been served. But, to the extent that he is a representative of one or more organizations, things that he does in furtherance of the organization, you know, are germane to the issue before this court.

MR. CADLE: Should he be present then and not sequestered.

THE COURT: No. He's going to be a witness as far as I can tell. It's very troublesome dealing with organizations that are not legal entities.

MS. PATRICK: Candidly, Your Honor, that's one of the difficulties faced by the clinics. And, as you'll see as we go forward the ability of these defendants to

adopt new names and use the same tactics and so on creates considerable difficulty.

But, the fact is that this witness has testified that he knows of the relationship of the Defendant Raney to the Women's Legal Action Committee, that he also knows of the relationship of the Defendant Raney to the Defendant Operation Rescue.

And, this wanted poster is being offered as an example of the tactics that have been used against this doctor.

THE COURT: It's a tactic apparently by no one here [p. 55] named as a defendant. It bears the imprint of an organization not named.

MS. PATRICK: Your Honor –

THE COURT: And, he's testified the other two or likewise. Perhaps, you know, when the witness Raney is called you maybe able to establish that whatever he did with this poster he did with – for one or more –

MS. PATRICK: Duel capacities.

THE COURT: – organizations. I'm going to have to sustain the objection at this point.

MS. PATRICK: All right, Your Honor. May I ask the court, I believe I will be able to make that tie up. I would like for the smoothness and flow of the proceedings to go ahead and ask the witness about the effect that this poster has had, on my representation that I will tie it up. If I don't, the testimony can obviously be stricken. But, that seems to be an efficent [sic] way to go forward.

THE COURT: Yes, you may proffer.

MS. PATRICK: All right. We will now proffer the testimony of Dr. Snydle as to the effect of the wanted poster on him.

PROFFER

BY MS. PATRICK:

[p. 56] Q Dr. Snydle, would you tell me how you felt when you saw this flier?

A Very concerned because my in my estimation it was a thinly veiled attempt to have one of the lunatic fringe assassinate me or kill me. It says a thousand dollar reward, wanted, my picture.

And, in fact, many patients called my office to find out if I was really wanted by the police. My next door neighbor thought – he's from England – thought that I was wanted by the police until my father told him otherwise.

Q All right. Now, I would like to show you, Doctor –

MS. PATRICK: That would conclude the proffer of the testimony, Your Honor.

Q I would like to show you, now, what we have marked for identification as Plaintiffs' Exhibit Forty-four – I'm sorry, forty-six. I'm sorry, it's zero not a six, exhibit forty.

THE COURT: For the record, identify the letter on the backside, please.

Q Doctor, I would like to show you what has been marked as Plaintiffs' Exhibit NN.

A Yes, ma'am.

Q Can you identify it for the court, please?

A Yes, ma'am. This was a sheet of paper that was placed on cars in the parking lot of the Comfort Inn when I [p. 57] stayed there approximately a month ago.

Q All right. Doctor, would you recount –

MS. PATRICK: We would offer Plaintiffs' Exhibit NN at this point, Your Honor.

MR. WEISS: May I place an objection? There has been no showing whatsoever that that is any way connected with the activities of the defendants that are before the court at this point.

THE COURT: Sustain. Insufficient predicate.

Q Dr. Snydle, would you tell the court please what happened at the Comfort Inn when you stayed there approximately a month ago? Specifically with regard to actions that you observed on the part of Operation Rescue, the people you have identified as Operation Rescue personnel.

MR. WEISS: Objection, Your Honor. It's vague, the question is vague and ambiguous. We've got to have some names here. If we're going to hold folks in contempt, I want to know who violated it.

MS. PATRICK: Well, Your Honor, the witness –

THE COURT: I'm troubled. Can he relate the source of that document?

MS. PATRICK: Yes, he can, if I may proceed?

THE COURT: Get him to do that first, please.

Q All right. Doctor, did you see that leaflet being handed out at the Comfort Inn by persons affiliated with [p. 58] Operation Rescue when you were staying there?

MR. WEISS: Same objection, Your Honor. It's vague and ambiguous. Persons affiliated with. I want names. This guy says he knows who they are. I want to think there's a predicate. If he knows some of the named defendants it's perfectly all right to tell.

MS. PATRICK: Let me back up. I'll do it this way.

Q On the date you were staying at the Comfort Inn, in connection with the incident that you were about to recount, did you see the Defendant Bruce Cadle there?

A Yes, ma'am. I did.

Q Did you see the Defendant Bruce Cadle's wife there?

A Yes, ma'am. I did.

Q Did you see the Defendant Bruce Cadle's son there?

A Yes, ma'am. I did.

Q What is the Defendant Bruce Cadle's position in Operation Rescue to your knowledge?

A He's one of the higher echelon. I don't really know exactly what his title is proclaimed to be.

Q All right.

A But, definitely associated with it.

Q Did you see the Defendant Raney there?

A No, ma'am. I don't recall that.

Q Did you see the Defendant Ed Martin there?

A No, ma'am. I don't recall that.

[p. 59] Q All right. Did you see the Defendant Judy Masen there?

A No, ma'am. I don't recall that.

Q Did you see a person known as Keith Tucci there?

A I don't even think I know who Keith Tucci is.

Q All right. Doctor, would you tell the court, please, what happened to you a month ago at the Comfort Inn? Is this the Comfort Inn that's down the way from the Aware Woman Clinic?

A Yes, ma'am. It's on Wickham Road.

Q All right. Why were you staying at the Comfort Inn about a month ago?

A I was to work at Aware Woman the following day. Instead of driving all the way from Haines City, Florida, which is a good two hour drive, I worked in Orlando that particular afternoon and then – which was a gynecology clinic. And, then decided just to drive to Melbourne and stay over night there, which would make my evening a little bit easier.

Q All right. And, what happened when you got up in the morning and came downstairs to head off to work?

A When I was about to check out, there were probably six or seven people in the lobby who immediately got right in my face with their V.C.R. cameras and their flash photo cameras and tried to accost me and called me a murderer and a [p. 60] butcher and this man performs abortions.

MR. WEISS: Your Honor, I would object to his testimony. This testimony has not in any way named any names of any of the named defendants in this case.

THE WITNESS: One of them was Bruce Cadle's son.

MR. CADLE: He is not a named defendant.

MS. PATRICK: Your Honor, we've gone through with this. Counsel may not want to acknowledge that there were, in fact, people who are named defendants there and that they did, in fact, instigate actions on the part of others. But, this witness has testified that Bruce Cadle was there, that his wife was there, and that his son was there, and is about to offer testimony as to actions the son took.

THE COURT: That's a sufficient tie.

MS. PATRICK: All right.

THE COURT: Overruled.

Q Now, you were saying that these people came up with there [sic] video cameras and –

A Yes, ma'am.

Q – their flash bulbs?

A Yes, ma'am.

Q How close did they get to you, Dr. Snydle?

A Within a foot.

Q Were they talking in a normal tone of voice?

[p. 61] A No. They were yelling. In fact, one gentleman there, I don't recognize him the court today, was claiming to everybody who could listen that I was an abortionist who traveled all over the country murdering children and other vile kinds of things.

Q All right. And, did you see this leaflet marked as Plaintiffs' Exhibit NN in connection with that activity?

A Yes, ma'am.

MS. PATRICK: All right. We would offer Plaintiffs' Exhibit –

MR. WEISS: Your Honor, I move to strike that last question and answer. It's based on a document that the court ruled is inadmissible.

MS. PATRICK: Your Honor, I'm establishing a foundation. The witness has said that he saw this in connection with the activity.

THE COURT: Overruled.

MS. PATRICK: Your Honor, we offer Plaintiff's Exhibit NN.

MR. WEISS: May I voir dire, Your Honor?

THE COURT: Yes.

VOIR DIRE EXAMINATION

BY MR. WEISS:

Q Doctor, "Child killer inside Comfort Inn, Frank [p. 62] Snydle, a known child killer." Do you know who authored this document?

A No, I don't.

Q Was this document in the possession of any of the defendants in this case? Bruce Cadle? Judy Madsen? Ed Martin? Shirley Hobbs? Did you ever see –

A I have no idea.

MR. WEISS: Your Honor, I'm going to move that this document not be admitted. We don't know the source of the document. He never saw it in the possession of any of the named defendants in this case.

MS. PATRICK: Your Honor, it is res gestae. He has testified he saw it at the Comfort Inn in connection with the activity. It was pertinent to what happened to this doctor on that day.

It is res gestae. I'm certainly not offering this document for the truth of the matter asserted. That is clearly not the purpose.

THE COURT: Doctor, you went from the lobby to the parking lot and it was after your confrontation in the lobby and the documents were on the cars outside? Is that –

THE WITNESS: Yes, sir. And, I saw a gentleman holding some of these that I said I did not recognize in the court today.

[p. 63] THE COURT: Among the six or seven –

THE WITNESS: There –

THE COURT: – that were confronting you in the lobby?

THE WITNESS: I don't think it was one of those individuals. There were about twenty to thirty people outside also.

THE COURT: How do you relate the activity of those outside with those inside?

THE WITNESS: Well, they all seemed to be there for the same purpose.

THE COURT: At the same time?

THE WITNESS: Yes, sir.

THE COURT: Overrule the objection. Let it be received.

(Whereupon, Plaintiffs' Exhibit Number One was admitted into evidence.)

DIRECT-EXAMINATION

CONTINUED BY MS. PATRICK:

Q Dr. Snydle, after these people got what, eight inches from your face and screamed at you that you were a murderer –

THE COURT: He said one foot. You've reduced it a little bit.

[p. 64] MS PATRICK: I'm sorry. I can't see from there.

Q After they got a foot from your face and screamed at you baby killer, what action did the hotel management take at this point?

MR. WEISS: Object to the form. It's leading, sir.

Q What action did the manager take –

MR. WEISS: She's asking what steps did the hotel manager take. That's leading the witness.

MS. PATRICK: Let me break it down into tiny baby steps for counsel, if it's convenient for the court.

THE COURT: No, it's not convenient. But, I'm troubled with what actions did he take. You don't know the basis of how he knows what somebody else did.

Q What did the motel manager say to you, if he did?

A Well, the desk clerk told someone to call the manager. And, an individual came out, told these people in the lobby that they must leave. They did not want to do that.

He actually took one by the arm and headed him out. I don't know what individual that was that he took by the arm and led out.

He asked them please all to leave. Eventually most of them did.

Q Doctor, what happened after those people left? Where did you go next?

A Actually I went and sat down and tried to have a cup [p. 65] of coffee. That's when Bruce Cadle's son came

up with his – with his camera and started taking my picture and telling me I was a paid abortionist and child murderer, et cetera, et cetera.

Q How close was Bruce Cadle's son to you when you were trying to drink your coffee?

A Within two feet or so.

Q All right. How did it make you feel that these people, Mr. Cadle's wife, Mr. Cadle's son had come within a foot to two feet from you and called you a child killer?

A It made me very uncomfortable. They clearly out numbered me.

Q Did you fear for your physical safety?

A Yes, I did.

Q How long did it take you to get to work that morning?

A From what time?

Q From the time they confronted you. Did it delay your arrival at the clinic?

A Yes, it did.

Q How long?

A I'm sorry. I would guess half an hour.

Q All right. Have you been back to that Comfort Inn since that happened, Dr. Snydle?

A No, ma'am.

[p. 66] Q Why not?

A I didn't want another confrontation like that, not only for myself, but I didn't want to put all the people in the hotel through that. I was very uncomfortable.

THE COURT: Doctor, you have referred to Mr. Cadle's son. Have you been able to determine his age?

THE WITNESS: I really can't. I can guess. Approximately, I would say, Judge, around twenty years old, give or take three years either way.

Q Dr. Snydle, I would like to show you what has been marked as Defendants' – Plaintiff's OO. What is the date of that letter?

A The date of the letter is December 29, 1992.

Q Did you receive that letter?

A Yes, I did.

Q Is it addressed to you from Meredith Raney?

A Yes, it is.

MS. PATRICK: All right. We offer Plaintiffs' Exhibit –

MR. WEISS: Your Honor, Meredith Raney is not a defendant in this cause. It's never been established that Meredith Raney has any connection whatsoever with Rescue America, Ed Martin, Judy Madsen, or Shirley Hobbs. Until a nexus is shown, there is no basis to introduce a letter from a non-party. I don't see what possible [p. 67] relevance that letter has. Besides, it's unsigned.

MS. PATRICK: The witness has testified that he received it, Your Honor.

THE COURT: I understand it's the same basis. What is your nexus?

MS. PATRICK: The nexus is earlier that Meredith Raney is associated with the Defendant Operation Rescue. This is an example of the tactics that Operation Rescue, a defendant in this case has used to harass this doctor and prevent him from going to Aware Woman Clinic, which, after all, is what we're talking about. People cannot feel free to go and from the clinic.

We will tie it up with the testimony of Dr. Raney, which, if the court will allow me to proceed, I will proffer the testimony now for that purpose.

THE COURT: All right.

MS. PATRICK: With the court's permission.

THE COURT: All right. You may proceed. Overrule the objection.

PROFFER

BY MS. PATRICK:

Q All right. Doctor, did you receive this letter at or about December 29, 1992?

A Yes, ma'am.

[p. 68] Q All right. Do you know Defendant Meredith Raney by sight?

A Yes, I do.

Q Has he often been close to you physically?

A Yes, he has.

Q Would you describe –

MR. WEISS: Just so the record can be clear, I would like to interpose one more objection. They're making Meredith Raney a focus for the imposition for sanctions in this cause.

It is wholly inappropriate for him to be outside. I invoked the rule of sequestration. That certainly wouldn't be applied to a party that's the principal focus of all these questions.

I'm very concerned about his due process rights being violated by me invoking the rule. If he is going to be at the root of the imposition of sanctions, he ought to be here.

THE COURT: Counsel, you could have named him as a representative of Operation Rescue.

MR. WEISS: He's not a representative.

THE COURT: That may have some status if he's not been served or entered an appearance.

MR. WEISS: He has no relationship with Rescue America, Your Honor. That's my client. My client has [p. 69] not even properly been named in this cause either. If they're –

THE COURT: You are distinguishing that from Operation Rescue? Is it a different organization than Operation Rescue America?

MR. WEISS: There isn't an organization Operation Rescue America. There is an organization Rescue America. It's never been properly named in the pleadings in this case from the beginning to date of these pleadings.

I'm just concerned about Mr. Raney's own due process rights being violated. He's the principal focus of imposition of possible sanctions and he's sitting outside.

MS. PATRICK: Your Honor, he is not a party to these proceedings. He's a witness that counsel seems to want to argue about things that are not at issue.

But, the fact of the matter, this is similar to the testimony concerning an employee that's in a truck accident. The employee doesn't have any right to be there. This is nonsense.

THE COURT: Doctor, again, you know Raney to be an officer or, as you say, higher echelon of which organization?

THE WITNESS: Of that Unity Coalition – Women's Coalition. The names are very confusing. They change. [p. 70] Operation Rescue, Freedom America. It changes regularly. It's very difficult to keep all these names.

THE COURT: Specifically as to Raney.

THE WITNESS: Operation Goliath, also the Women's Coalition or Unity, whatever the name of that one is.

MS. PATRICK: The Defendant Opeation [sic] Goliath is also the target of the contempt proceedings here today.

THE COURT: You don't represent Operation Goliath?

MR. WEISS: No, sir. No, Your Honor.

THE COURT: I'll give him the opportunity to indicate whether or not he wishes to be the representative for Operation Goliath. Mr. Bailiff, go get him, please.

MS. PATRICK: Your Honor, just for clarity or the record, I would indicate Bruce Cadle is the target of the contempt proceedings is also with Operation Goliath. I think he identified himself at the beginning of the proceedings.

THE COURT: Right there will be fine. Mr. Raney, hang on just a minute. I'm going to try to clarify your status.

First, Mr. Cadle, I don't mean to disregard what you may have indicated earlier to the court. You are here in an individual capacity having been named. But, are you here in a representative capacity for any organization?

[p. 71] MR. CADLE: No, Your Honor, I'm not.

THE COURT: Mr. Raney, it's been brought to the court's attention that you have some affiliation with one of the named defendants Operation Goliath and perhaps one of the other, Operation Rescue.

In as much as those organizations are named, they are entitled to have a representative in the courtroom. And, if you are a representative of those organizations, then I want to extend to you the opportunity to be present during all testimony as it would relate to those organizations.

Do you – Are you a representative of those organizations?

MR. RANEY: No, sir.

THE COURT: Operation Rescue, Operation Rescue America, and Operation Goliath, you are not a representative of those organizations?

MR. RANEY: No, sir.

THE COURT: Thank you, sir. You many return outside.

MR. WEISS: Your Honor, based on that, I move to strike and that those exhibits be withdrawn from evidence. Out of the mouth of Mr. Raney, he's just disclaimed any association with these organizations. That's first party evidence.

THE COURT: Made not under oath. And, I think he's [p. 72] entitled to be called as a witness. At that time and under oath, at that time, you know, perhaps the court can make a determination. But, I'm not going to say he's not. And, they can show through his activity that he may be. His pronouncement isn't necessarily controlling.

MS. PATRICK: All right, Your Honor.

Q Did you receive this letter from the defendant – from – I'm sorry – Meredith Raney on or about December 29, 1992?

A Yes, ma'am.

Q Would you tell the court, please, what effect it had on you? Can you –

A Well, it had the effect of being a threat that if I were to work in Melbourne that obviously I would be the target of these people and their field representatives.

Q All right. Were the newspaper articles that are a part of this exhibit attached to it when you received the letter?

A Yes, ma'am.

Q All right. And, the letter refers to the activities planned for Melbourne over the next three months, that is the three months from December 29, 1992?

A Yes, ma'am.

Q What is the last sentence of that letter?

A "You may not want to be a part of it."

[p. 73] Q What was your reaction to that sentence when you received it?

A As I said, to me I interpretted [sic] clearly as a threat.

MS. PATRICK: At this time, based on the ability to tie in the exhibit later, we would offer it. It is certainly pertinent to show the state of mind of this witness as to the effect it had.

THE COURT: And, the signature or identity of the sender?

THE WITNESS: Meredith Raney.

MR. WEISS: It's not signed, Your Honor.

THE COURT: Well, does it have his name on it – in it?

THE WITNESS: Yes, sir. It's on the inside address here of the address Meredith Raney, 2488 Burns Avenue, Sincerely yours, Meredith Raney.

MS. PATRICK: If the court would like to look at it, I have another copy of the exhibit.

THE COURT: Hold it up, sir, so I can compare.

The court notices that in the newspaper articles, they do refer to Operation Rescue, Impact Teams, Operation Goliath.

MS. PATRICK: And, the Defendant Bruce Cadle, I believe, is quoted in the articles, Your Honor.

MR. WEISS: Your Honor, just for whatever it's [p. 74] worth, I do want to interpose an objection. That sure – those newspaper articles constitute double or triple hearsay.

THE COURT: Well, but it's a fact that apparently Mr. Raney, you know, copied them and included them in the letter as part of the contents Raney submitted.

I believe it's, you know, it's relevant. The court will receive it. Doctor, if you would hand that to the clerk again, please.

(Whereupon, Plaintiffs' Exhibit Number Two was received in evidence.)

Q Doctor, since the permanent injunction was issued by this court in September of 1992, have you seen Bruce Cadle or members of his family picketing at your house?

A Not at my house.

Q All right. Have you seen them picketing you other places?

A Yes, ma'am.

Q Where?

A At Aware Woman.

Q All right. Have you seen them carrying signs that bear your name and call you things like a child killer and so forth?

A I can't really remember specifically that they carried a sign with my name on it. But, many of them do. [p. 75] And, whether it was Bruce Cadle or one of the people he was associated with, I can't really testify to that.

MR. WEISS: Move to strike then, Your Honor. The answer is not responsive. The question was have you seen Bruce Cadle carrying a sign. The answer was he didn't see Bruce Cadle doing that.

Q Have you seen persons present at a demonstration, where Mr. Cadle was also present, carrying signs with your name and bearing accusations against you?

A Yes, ma'am.

Q How many –

THE COURT: By the way, let me rule on the objection. Your last questions [sic] was did – were others who maybe carrying signs with the name on it. I believe you testified you could not identify Cadle as one that carried a sign with his name on it. But, he carried a sign while others were carrying signs with his name on it.

I think it's relevant. The court will receive it. Overrule the objection.

Q Have you, other than the time that you were accosted at the Comfort Inn by Mr. Cadle's son and his wife, have you otherwise been accosted by the Defendant Meredith Raney, Mr. Cadle, or other persons you know to be associated with Operation Rescue since the entry of the injunction?

[p. 76] A I don't know what you mean by accosted. Physical assualt [sic] ?

Q Well, are people crowding around you or approaching you, screaming at you?

A Yes. Definitely. And, Mr. Raney also chased me in his pickup truck while we were in Melbourne. And, there's a gentleman in the audience, are [sic] whatever you call it, who can testify to that –

Q All right.

A – as a witness.

Q And –

THE COURT: He hadn't better be in the audience.

THE WITNESS: He's in the court.

MS. PATRICK: He's not going to testify.

Q Would you tell the court what happened when Mr. Raney chased you in his pickup truck?

A Yes, ma'am.

THE COURT: Time and date, please, if you will.

Q When did that happen?

A This was sometime in October, I believe, give or take a samll [sic] amount of time. I was going to leave the Aware Woman's Clinic and Mr. Windle told me that Meredith was sort of parked off in a little area and he said, "I think he's going to try to follow you. So, why don't you go out the back way."

[p. 77] So, I went out the back way and Mr. Windle was following me in his car. And as I got on to Highway One, Mr. Raney pulled out in his pickup truck behind me. And, Mr. Windle and he sort of had a duel down the highway, Mr. Windle trying to block Meredith Raney's truck from approaching my car. When I thought – I was observing this through the rearview mirror.

Q All right. Dr. Snydle, did you pull off the highway?

A Yes, ma'am.

Q Tell the court what happened when you pulled off the highway. Where did you stop?

A I stopped –

MR. WEISS: I just want to interpose an objection. He said sometime about October. Your order was September. I think it's critical that we establish this is after the date of the entry of your order. I don't think this witness can testify to that.

THE COURT: Doctor, can you relate it to the date of the injunction?

THE WITNESS: Yes, sir. It was after the injunction.

THE COURT: You may continue.

Q When you pulled of Highway One, where did you stop?

A I stopped at McDonald's to get a drink on the way [p. 78] back to Orlando.

Q What did the Defendant Raney do – What did Meredith Raney do?

A He pulled up next to me in his pickup truck and looked down and grinned at me and went like that and then drove away and parked.

THE COURT: Doctor, for the record, you held your forefinger extended and your thumb up as if to indicate a gun?

THE WITNESS: Yes, sir.

Q Was that your understanding? How did you react to that gesture, Doctor.

A That he had in his mind shot me.

Q What did that – How did you feel after that happened?

A Fear, revulsion.

Q Did it make you want to go back to work at the clinic?

A No, ma'am.

Q How many times had the defendants Bruce Cadle or Meredith Raney or people associated with Operation Rescue tried to block your access to the Aware Woman Clinic?

MR. WEISS: Your Honor, again the generic term folks associated with Operation Rescue. They're seeking to hold my clients in contempt. I want their questions to [p. 79] be specific with respect to Ed Martin, Judy Madsen, or Shirley Hobbs. And, I think it's critical. They're seeking some rather severe sanctions.

MS. PATRICK: Your Honor, I think I can represent to the court of one question from Dr. Snydle that Mr. Martin and Ms. Madsen, and Ms. Hobbs are not the subject of Dr. Snydle's testimony.

Q Have you, since the injunction, encountered them in any way?

A Yes, I have.

Q All right. Why don't you tell us about that.

A Both at Aware Woman and also at Central Florida Women's Health. I have seen the people mentioned. Judy for one, there with their signs and blocking the driveway –

Q All right.

A – when I came in.

Q And, when did that happen in time, Doctor. Was it after the issuance of the injunction?

A Definitely.

Q And, you've see [sic] the defendant – you've seen Judy Madsen blocking the driveway of Aware Woman?

A Not Aware Woman, but Central Florida Woman's Health.

Q What about Ed Martin?

A Yes, ma'am.

MR. WEISS: Central Florida Women's Health is not [p. 80] located within the jurisdiction of this court. I think if they're to be in contempt of your order it would have to be within the boundries [sic] of your jurisdiction. Your order is very specifically tailored to the counties in question.

MS. PATRICK: I will –

THE COURT: I think he's right.

MS. PATRICK: I think he is to [sic]. I'll clear it up.

Q With regard to Aware Woman, Doctor –

A Yes, ma'am.

Q – that's my question, Aware Woman or Epoc or the other plaintiffs in this action, have you see [sic] the defendant Ed Martin, at any time since the issuance of the injunction, blocking the driveway of those clinics?

A Yes, ma'am.

Q Tell the court about that.

A At Aware Woman, not only Ed Martin, but also Bruce Cadle, and everyone except Judy. I have not seen Judy there.

Q All right.

A Meredith Raney definitely.

Q And, was that at a time you were trying to gain access or did you observe them doing that with regard to others trying to gain access?

A Both.

Q How many times have you seen those defendants [p. 81] attempt to block access to the Aware Woman Clinic by standing in the driveway?

A Since the injunction?

Q Yes.

A At least twice.

Q All right. How many attempts since the issuance of the injunction, Dr. Snydle, have Mr. Cadle or members of his family made to cause you to cease working at Aware Woman Clinic?

MR. WEISS: Your Honor, I'm going to object back to the earlier question. We need to establish within your jurisdiction. We're talking about all the major abortuaries in the Central Florida area, which include abortuaries other than those outside the confines of Seminole County and Brevard County. If he wants to talk about what happened under your jurisdiction, that's appropriate.

THE COURT: You're going to have to limit it.

MS. PATRICK: We'll limit it to that, Your Honor, I don't have any difficulty with that.

THE WITNESS: I thought we had limited it to that.

MS. PATRICK: Right. We're talking about Aware Woman.

THE WITNESS: Aware Woman.

MS. PATRICK: Aware Woman, right.

[p. 82] Q How many attempts has Bruce Cadle made to cause you to cease performing services at Aware Woman?

A A minimum of two if not more than that.

Q What have been the effects on you personally of the actions taken by Defendant Cadle, Defendant Martin, and Mr. Raney?

THE COURT: Counsel, I'm going to have to ask you to break –

MS. PATRICK: Break down.

THE COURT: – break it down. Ask individual questions as to each individual person.

Q What have been the effects of the efforts made by Mr. Cadle on you personally to cause you to cease working at Aware Woman?

A Anxiety, fear, concern.

Q What about Mr. Martin?

A Same.

Q What about Mr. Raney?

A Probably the worst of all, I mean –

Q How so?

A He has been the most aggressive of anybody. Mr. Cadle has been very vocal as has Mr. Martin. But, they have not tried to personally assault me. Mr. Unterberger and Mr. Raney are the two really vicious ones.

Q Dr. Snydle, tell us why you quit working at the [p. 83] Aware Woman Clinic?

A Because of the murder of Dr. Gunn (phonetic).

Q Were you afraid something might happen to you at the Aware Woman Clinic as a consequence of the actions of Defendant Cadle?

A Yes, ma'am. Absolutely.

Q Were you afraid that something might happen to you at the Aware Woman Clinic as a consequence of the actions of Defendant – of Meredith Raney?

MR. WEISS: Your Honor, I would like to interpose an objection with respect to anything dealing with Dr. Gunn's very unfortunate murder in Pensacola. Your Honor, that occurred a week ago. He's talking about an incident that occurred, he said, in October of 1992. And the incident involving Dr. Gunn was less than a week ago.

So, how can he be afraid of dying like Dr. Gunn at an event that occurred in October. I move to strike it.

MS. PATRICK: Your Honor, the witness is – I've asked working. He said it was the day after Dr. Gunn died. I am now asking him whether the tactics about which he has testified cause for him to fear for his safety at the Aware Woman Clinic and thus not go there to work any more.

That's clearly pertinent to the proceedings here today.

[p. 84] THE COURT: Yeah. It's the continum [sic] of the activity that he's testifying about and I believe it's, you know, you may continue.

MR. WEISS: Just so the record reflect it, I do want to interpose an objection for the record. There is no showing whatsoever that the actions of this murder in Pensacola are in anyway associated with that of Ed Martin, Judy Madsen, Shirley Hobbs, Rescue America, Bruce Cadle, Meredith Raney, Operation Rescue.

I want the record to reflect that there's been no nexus shown.

MS. PATRICK: If counsel wants to testify about Dr. Gunn's murder, he can testify about it. But, that's not a proper objection, Your Honor, And, I'd ask counsel be instructed to lodge objections to the evidence in accordance to the rules.

THE COURT: Well, he's testified it was a triggering event after a series of other confrontations, but, you know, the court's received no testimony that the homicide in Pensacola is related to anyone here. You may proceed.

Q Did the actions of Meredith Raney that you testified about cause you to fear for your safety at the Aware Woman Clinic?

A Yes, ma'am.

Q Did they cause you to cease to work at the Aware [p. 85] Woman's Clinic?

A That's one of the factors certainly.

Q What about the actions of the Defendant Bruce Cadle?

A The same.

Q What the actions of Operation Rescue?

A The same.

MR. WEISS: Your Honor, I'm going to have to interpose again. Operation Rescue, again, we've got that generic label Operation Rescue. If that any [sic] way implies activities to these named defendants I represent, I would request a specific question.

MS. PATRICK: Your Honor, I've said it more times than I can count. We are not seeking at this juncture to tie his clients to Operation Rescue. If counsel wants to represent Operation Rescue, that's a different matter. But, as of right now, that distinction has been clear, I think, throughout the examination of this witness.

MR. WEISS: It hasn't been clear to me.

THE COURT: Both of you are agreed.

MR. WEISS: Well, if she's stipulating that my clients are not subject to any of the actions here seeking sanctions, I'd just as soon pack up and leave.

MS. PATRICK: Your Honor, with all due respects to counsel –

THE COURT: He's testified that Mr. Martin has [p. 86] blocked the driveway in Melbourne. You may proceed.

Q Did the actions of Mr. Martin cause you to fear for your safety at the Aware Woman Clinic?

A Yes, ma'am.

Q Would you still like to work at the Aware Woman Clinic, Doctor?

A Yes, ma'am.

Q Why don't you work there today?

A Because of fear, of concern of the same thing that happened in Pensacola.

Q All right.

A Because it has been escalating. The severity has seemingly escalated over the last year at least. The confrontations, the kinds of pseudo violence and anticipated violence.

MS. PATRICK: Thank you, Your Honor.

CROSS-EXAMINATION

BY MR. WEISS:

Q Referring you now to Plaintiffs' Exhibit One, would you please point out to the court any statement in Plaintiffs' Exhibit One that you maintain to be an untrue statement?

A That I'm a known child killer.

Q In performing abortions is a human life ended?

MS. PATRICK: Objection, Your Honor, relevance.

[p. 87] MR. WEISS: Your Honor, it goes to the truth of the matter here.

MS. PATRICK: Your Honor, the point of the offer of the exhibit and so on is not the truth. I specifically said when I offered the exhibit we were not offering it for truth. What these people do for a living, the services they provide is not at issue here.

The issue is whether they are entitled to the protection of this court's order. Counsel is not here entitled to debate the merits of what Dr. Snydle does in the exercise of his medical judgment with regard to treatment of his patients. That is not relevant.

THE COURT: Sustained.

Q Mr. Snydle, would you point out any other –

MS. PATRICK: Excuse me, Your Honor, could we please address the doctor as Dr. Snydle.

MR. WEISS: Since when has it become so rarified that you are under court order to call this gentleman doctor? I mean, if you rule I have to call him doctor, I'll call him Ray, I'll call him whatever you say, Judge.

THE COURT: He can refer to him however he wishes. I'm not going to order him to.

Q Now, you said Ed Martin in October of 1992 blocked your entrance to the Aware Woman Clinic.

A Somewhere around that time.

[p. 88] Q Some –

A After the injunction, definitely.

Q Okay. So, you saw this man – there is no possibility he was in the State of Washington, Alaska or –

A I don't know where he was.

Q I thought you said you knew he was at the Aware Clinic.

A He was. I don't know where else he was, but he was there.

Q That's in October of 1992?

A Yes, sir.

Q Tell me how it is you remember that date, sir?

A Because it was after the injunction, shortly after the injunction, within several weeks of that.

Q Okay.

A So, I'm assuming it may have been early November. I don't know. But, it was sometime in that time frame.

Q Now, when ladies go in and they're pregnant and they're going to have an abortion, I believe your testimony was that some of them are distraught or nervous or –

A Yes. That's correct.

Q Now, most folks who come in to have their baby killed, do they seem upset or huffy?

MS. PATRICK: Objection, argumentative, Your Honor. Again, we're not here debating the merits of the what the [p. 89] Aware Woman Clinic provides. Counsel is not entitled to debate this issue with this witness.

MR. WEISS: Your Honor –

MS. PATRICK: This is a constitutional right. He may characterize it as baby killing. Dr. Snydle and my

clients believe it is legitimate medical care licensed by the State of Florida. That's an argumentative question.

THE COURT: It is argumentative.

MR. WEISS: Your Honor, it goes to causation. He's saying the ladies that come in there seeking to have an abortion, that some of them are nervous. What I want to ask him about is other alternative causes that may make them nervous, such as concern about the procedure, what they might be doing to themselves and their child.

THE COURT: Okay. To the extent that you used buzz words associated with your movement, those are emotional and they are argumentative. And, I'll ask you not to use them.

Q Okay. When the abortion service is provided, are all your patients who come in cool, calm, and collected at the time the procedure is to take place?

A No, sir.

Q Okay. And, you are positive of your own personal knowledge that those that came in that were not cool, calm, and collected about the abortion procedure were doing so [p. 90] exclusively as a result of the activities of these defendants? Is that correct?

A Not all individuals who are upset are upset because of the picketers. But, many of them mention that picketers as a reason for them being upset.

Q And, you do recognize that this court's order authorizes and permits First Amendment activity outside

those abortion clinics; do you not sir? They have the right to be out there?

A Yes, they do.

Q Okay. And, when the women see folks outside protesting what they're doing wrong, it elevates their heart rate, causing them to breath harder; correct?

A I really think it's the level of activity outside. If people are there peacefully protesting with pickets or signs, it probably does not cause nearly the emotional stress and distress for the patients as when they are being yelled at and screamed at that they are murderers and they are killing their child, et cetera, et cetera.

Q Okay. Now, with respect to, you said you had a specific patient in mind that you recall having no record of hypertension. Would you please tell me who this patient was so I can identify from the medical records if this person had a prior history of hypertension?

MS. PATRICK: Your Honor, we object. The patient [p. 91] in question has a right to privacy and her own decision and privacy of her identity. She is not a party to this proceeding.

The doctor has testified to his observations. This witness is – This proceeding is not designed to waive the medical privacy and the medical privilege, and confidentiality. That is the issue.

The issue is what did this doctor observe.

MR. WEISS: Your Honor, I believe they opened the door. He said no prior history of hypertension. I think

I've got a right to look at those medical records to investigate fully whether or not this heavy breathing that he said is in any way associated with the activities of my client or the normal tension associated with the procedure or some other pre-existing condition. He's opened it up.

He made reference to a specific patient on a specific day having hypertenion [sic] as a result of what my client did. I think I'm entitled to explore that.

THE WITNESS: Your Honor, may I address the court, please.

MS. PATRICK: No. Your Honor, with regard –

THE COURT: You can, Doctor, if that patient authorized you to speak.

THE WITNESS: No, sir. I just wanted to try to [p. 92] clarify something.

THE COURT: All right. Well, counsel, it's – Ordinarily you would have that right in cross-examination. But, the court recognizes there is also a conflicting right of privacy. And, it's a matter of balancing those respective rights.

And, I believe that in like situations the appellate courts have told us the right of privacy is paramount.

MR. WEISS: Your Honor, I can furnish with a case in the State of Florida dealing with the proposition that a doctor can get on the stand and try to charge my client with sanctions as a result of some heinous activity allegedly taken outside these clinics that's causing disability to a particular patient and that I'm not able to

inquire into who the patient was, what their condition was, what might have caused that condition.

And, I would move at this time to strike that testimony as being inadmissible because it's totally inappropriate to open the door and disclose all this health information with respect to a particular patient, utilize that specific information on a particular patient. Open the door wide enough to say a person has a terrible problem as a result of my client and not permit me to have the opportunity to cross-examine.

If they wanted to preserve that privilege, I think [p. 93] they have done a very poor job of doing that. I do think its wholly inappropriate and would move to strike that testimony. I should be entitled to cross-examine. We're talking specific individual on specific days.

THE COURT: Lee, see what you can find on it, please, balancing the right of privacy against the right of disclosure where it [sic] used as a example in the testimony of a witness.

MR. WEISS: While that's going on, I'll proceed, Your Honor.

MS. PATRICK: Your, Honor, the only thing I would call to the court's attention in that regard has been the case of In Re: T W, a Supreme Court of Florida –

THE COURT: Lee, they have a citation here that they're relying on.

MS. PATRICK: It is not directly pertinent to cross-examination. But, in In Re T W, Your Honor, the Florida Supreme Court recognized that the right of privacy adopted by the voters of this state as a constitutional

limit to the constitution was paramount. So much so, that the parental consent law was invalidated. That is a woman's right to treatment and obtain treatment at an abortion facility, even if she were a minor child, was paramount so that her identity could be concealed.

So, I think that that privacy amendment is a direct [p. 94] constitutional right of these parties. It is not – It does not go to the heart of the issue. It goes to the overall climate that has been created by the conduct of contempt.

And, at that point, Your Honor, we think the balancing of a clear constitutional right as against marginal relevance – marginal cross-examination at best.

THE COURT: It's a good cross-examination. In criminal cases, there would be no question about it.

MS. PATRICK: Well, I think, Your Honor –

MR. WEISS: I think this quasi criminal in nature. They want these folks to go to jail.

MS. PATRICK: Your Honor –

MR. WEISS: This is as close as you can come to criminal contempt.

THE COURT: Counsel, I've asked my law clerk to see if she can find some authority on it. Let's go ahead at this moment.

MR. D'ALEMBERTE: If I could cite one case, Your Honor, N. A. A. C. P. versus Alabama which balances these rights of privacy in context of the N. A. A. C. P.'s right –

THE COURT: Do you have the citation?

MR. D'ALEMBERTE: I'll dig it out.

MS. PATRICK: There is an additional case, Your [p. 95] Honor, that's a United States Supreme Court case. And, there is an additional case, The Black Panther Party versus Gray, I think. It was whoever the F.B.I. director was at the time. In the context of a civil case where information was sought for purposes of cross-examination, the court said no their right to associational privacy, which is also a direct constitutional right, had pre-eminence over the desire to obtain evidence for purposes of cross-examination.

THE COURT: I would like to see the authorities as to the right of medical privacy and see the one that dominates. But, go ahead.

Q Doctor, tell me the officers, you said you were familiar with the officers of the defendants in this case. Tell me who the officers in Operation Rescue are, if you know.

A I know Randall Terry –

Q Say that name again, please.

A Randall Terry is associated with Operation Rescue.

Q Okay. How do you Randall Terry is associated with Operation Rescue?

A Because he tells everybody he's associated with it.

Q Okay. Tell me who the officers are in Operation – First, are you familiar with whether or not an organization even exists known as Operation Rescue America?

A No, I don't.

[p. 96] Q Okay. The defendant in this cause, Operation Rescue America, you don't even know if such an organization exists?

A No, I don't.

Q So, if you don't know if it exist, you sure don't know who are its officers; right?

A That's correct.

Q You performed –

THE COURT: Do you represent Randall Terry?

MR. WEISS: No, Your Honor. These fine folks sitting right here.

THE COURT: Is Mr. Terry present?

MR. WEISS: No, Your Honor.

(Whereupon, a brief recess was had, after which the following proceedings were had:)

THE COURT: Okay.

MR. WEISS: Let me say, in South Florida Blood Services, Incorporated versus Rasmussen, 467 Southern Second 798. I realize they do no want disclosure outside this litigation. It's my desire there be disclosure within this litigation. I recognize –

THE COURT: Well –

MR. WEISS: – it's tough.

THE COURT: It's, as the court says here, it's a matter of balancing the conflicting rights. And, of course, it seems to me that with Roe versus Wade, is [p. 97] based on the right of privacy. And, of course, Florida has a constitutional right of privacy amendment. And, it's just – The court here says the more relevant and necessary the desired information is to the resolution of a case, the greater the state's interest in allowing discovery in this incident – instance, I should say.

And, I don't think that the name of a particular patient of the doctor is truly necessary for resolution of this dispute.

MR. WEISS: Just so I maybe heard for preservation of the record, there is a case pending in the circuit court. It's currently now up on appeal in the Fifth Circuit in which Judge Richard B. Burk, B-u-r-k, Circuit Judge, circuit court case in the Fifteenth Judicial Circuit for Palm Beach County, Florida and South Palm Beach County, a chapter of the National Organization for Women, case number 89-43336-AO versus Randall Terry and a whole slew of other defendants.

Judge Burk in that decision was confronted with this identical decision, with an [sic] published circuit court opinion in which he required, felt the balance tilted the other way.

I know that's certainly not binding on the court. That's the quickest authority I could find.

In the interim, with respect to this balancing test, [p. 98] I just, for the record, I do think to the extent that

they opened up a particular patient's condition and tried to draw from that condition actions attributable to my clients for which they seek criminal sanctions. This is quasi-criminal in nature. I do think we are dealing with a looser standard.

They certainly opened the door.

THE COURT: Counsel, I'm aware of, you know, the fact that when an individual becomes identified by name, she then becomes subject to mail of all sorts. And, I think that right not to be assailed with letters of all sorts, you know, is something to be protected.

MR. WEISS: Judge, I couldn't agree with you more. Perhaps that information could be disseminated in chambers subject to a protective order just between counsel, certainly not here in the presence of the press. So, I can explore whether or not it was any other related cause associated with this person's alleged hypertension.

And, I would certainly would be able to do it under a very strict protective order. I wouldn't even show it to my clients. I just want to find out what truly was the cause of this woman's alleged hypertension.

THE COURT: Well, it's offered as one of the reasons for inforcement [sic] of the court's injunction. It's one of many examples. And, I don't believe again determinative [p. 99] of the outcome of a particular action.

For that reason, I'll sustain the objection.

MR. WEISS: Thank you, Your Honor.

BY MR. WEISS:

Q Now, with respect to the activities of Judy Martin, you recognize Ms. Martin?

A Yes, sir.

Q Have you ever seen her in Seminole or Brevard County in front of the Aware Clinic blocking access?

A Not to my knowledge.

Q And, it's your testimony that Ed Martin, you personally saw him where, sir?

A In front of the Aware Women Clinic.

Q And, what was the day that that occurred?

A I can't give you an exact date. I know it was after the injunction.

Q And, what did Mr. Martin do?

A He was walking back and forth across the parking lot entrance. And, as I tried to get in with my car, everybody just sort of stood there. I blew my horn several times and then progressed.

Q So, you did blow your horn and they did move. That's a big Cadillac you drive; isn't it?

A Yes, it is.

Q Okay. And, when you blew your horn and said I'm [p. 100] coming through, you came through; didn't you?

A It took several times, yes, but I did go through.

Q So, in fact –

A In one of those instances, a police officer had to tell them to move aside.

Q And, at all times they obeyed the order of the officer and nobody physically restricted permanently your access into the clinic. You got through; didn't you, sir?

A That's correct.

Q Okay. Now, of your own personal knowledge here as a physician, tell me exactly how you know that the cause of hypertension in this unnamed patient is directly attributable to the actions of these defendants and no other cause?

A Well, for one thing, when the individual said, you know, I am so hyper because of those people outside yelling and screaming. That's one indication.

And, if they've never had any other hypertensive episodes medically documented and this one particular day they have hypertensive, to me that indicates some, at least, relationship.

Q And, this was attributable to the fact people were walking around picketing outside?

A No, not just picketing.

MS. PATRICK: Excuse me, Your Honor, could the witness – I don't think the witness had finished [p. 101] explaining why he drew that causal relationship when the counsel interrupted him. If I'm mistaken, I apologize. But, I don't think he had finished.

THE COURT: I sensed that it was.

MS. PATRICK: Okay.

THE COURT: Doctor, do you have any other basis for causally relating it?

THE WITNESS: No, sir.

Q Now, the actions that you attributed to be causally related are those of persons marching outside the premises, picketing, holding signs saying "Abortion is murder," things of similar import; correct? Saying there is killing going on inside.

A No. That's what I'm trying to tell you. It doesn't seem to be nearly as bad – Can I use the Orlando example –

Q No. No. Only talk about Seminole Brevard.

A Well, I want to tell you the differences.

Q That's not my question. I'm talking about what happened in the jurisdiction of this court that you are seeking sanctions against my clients.

A Let's just say that the women in Melbourne are much more anxious when I am there, when there's a lot of picketers yelling and screaming than when there are very few picketers or no picketers.

Q Isn't it a fact, sir, that it was the murder of Dr. [p. 102] Gunn that caused you to stop performing abortions in Brevard and Seminole County? You didn't want to get shot; right?

A That's correct.

Q And, you know of no nexus whatsoever between Judy Martin – Ed – I mean Judy Madsen, Ed Martin, my

clients, to the actions of Mr. Griffin (phonetic), the alleged murderer of Dr. Gunn.

A I don't know of any relationship, no.

Q But, since Dr. Gunn's murder you have performed abortions here in Orange County; haven't you?

A Yes.

Q Now, let's talk about this incident at the Comfort Inn.

A Yes.

Q Was Ed Martin there?

A I don't know. He may have been.

Q You didn't see him?

A I didn't see him that I remember.

Q And, you don't remember Judy – Martin – I mean Judy Madsen being there?

A They're the same. It doesn't matter.

Q They're the same to you?

A Yeah. They're all one organization.

Q They're all the same to you?

A Yes. All one organization.

[p. 103] Q And, you base that on your feeling that it's one united organization trying to stop abortions in America; right?

A That is correct.

Q Okay. And, the exercise of their free speech rights is what offends you; isn't it?

A No, it isn't. I would be the first one to defend their First Amendment right of free speech. It's when they antagonize and harass and intimidate and cause severe harm to innocent individuals that I object.

Q Now, with respect to the incident at the Comfort Inn, what was the date that incident took place?

A I don't recall the date. It was approximately a month ago.

Q All right.

A It may have been a week or two more or less.

Q And, you are saying that the thing that offended you was Bruce Cadle's son sticking a V.C.R. camera in front of your nose; right?

A No. That was one of the things. But, also confronting me, telling lies that I don't have malpractice insurance, that I injured his girlfriend, that I did an abortion on her and injured her. Well, I mean if this is a prolife movement, how in the world did this girl have and abortion by me? And, how was she injured by me?

[p. 104] Q And, these words were stated to you by who?

A By Bruce Cadle's son.

Q He said you performed an abortion on his girlfriend?

A That's correct.

Q And, you thought –

A Or a friend of mine. I don't remember exactly if he said girlfriend or a friend of mine, but it was some, you know, acquaintance, or friend of his.

Q And, he stated that you botched the job?

A Basically, yes.

Q But, you didn't botch the job?

A I didn't even know if I performed an abortion on her. I would doubt it seriously. They're part of the prolife movement.

Q Now, when the manager came out and said you must leave, the folks left; right?

A After he told them three or four times and had to actually guide one of the individuals outside. They didn't all go or if they did go, more came in because that was the first incident of the morning.

Q Now, was anyone arrested for trespass at the Comfort Inn?

A I don't know.

Q Was Mr. Martin arrested for allegedly blocking the access to the Aware Woman Clinic sometime after September, [p. 105] 1992?

MS. PATRICK: Objection, Your Honor. Whether they were or were not arrested for violations of criminal law has no relevance at all to whether they violated this court's civil injunction.

MR. WEISS: Your Honor, the basis for the injunction is the alleged inability of the police to accomplish and protect these abortionists in their endeavors. And, they're coming to you saying, we've got to have your help.

I want some demonstration, I think it's incumbent on them to demonstrate that somehow the criminal penalties were inadequate before we engage in judicial activism and say they need some help. I would think it's incumbent on them to demonstrate an inability to handle it with the criminal statutes we've got, with the trespass statutes.

MS. PATRICK: Your Honor, with all due respect, that has been demonstrated. There is a permanent injunction in place. We're seeking to enforce that order. The Plaintiffs have met that burder [sic] of proof. That is not the issue.

The issue is is [sic] the availability of the criminal law, because the police didn't happen to be there and didn't happen to arrest these people, is that ipso facto make the violation, the knowing violations of your [p. 106] orders, an irrelevant act that Your Honor cannot enforce? That's simply not relevant.

THE COURT: Sustained.

Q Now, that Sentinel Newspaper article, it says "Prolife activitists [sic] to converge on Brevard." Did you read that – I'm sorry. I apologize to the Sentinel. It was Florida Today, December 24, 1992. Did you read that article?

A Yes, I did. It was mailed along with Meredith's little letter.

Q Okay. And, did reading that newspaper article scare you?

A Yes.

Q Okay. But, even though this was on Christmas Eve, December 24, 1992, you went on performing abortions at the Aware Woman Clinic in January; didn't you?

A Yes.

Q And, you went on performing abortions in February; didn't you?

A Yes.

Q And, you went on performing abortions in March; correct?

A Perhaps, yes.

THE COURT: That's this month we're talking about.

MR. WEISS: Yes, Your Honor.

Q Well, once Dr. Gunn was shot, you said I'm out here.

[p. 107] A I am not sure about whether I did in March or not. I don't believe I did in March.

Q I believe it was your testimony on cross-examination that shortly after Dr. Gunn was shot that you ceased performing abortions.

A That's correct. But, I don't think I was scheduled in the first part of March, I know I was scheduled two days after he was shot.

Q The incident involving the pickup truck, what was the date of that incident?

A I really don't recall.

Q So, you don't know whether it was before or after this –

A All of these things that I'm talking about were after the injunction. I can tell you how I remember that. Because when the injunction was enjoined, if that's the correct terminology, it was in the newspaper and the newspaper articles were put up at the clinic. And, I remember thinking, you know, sort of post and ante or anti the articles being placed on the windows of the clinic.

Q All right. Let's talk about –

A So, I don't know the exact day of things. I can remember if it was after or before.

Q Let's talk about the dueling cars.

A Yes.

[p. 108] Q Mr. Windle is in here?

A That's correct.

Q And, where is he?

A Sitting over there.

Q That's Mr. Windle?

A Yes.

Q That guy in the blue shirt sitting in the front row?

A Correct.

Q And, to use your words, what he was doing was he was dueling with Mr. Raney. Trying to shove Mr. Raney's car off the road?

A No. He was trying to block Mr. Raney's truck from getting up to my car because he had seen Mr. Raney park in the bushes and thought he was going to try to follow me. So, he suggested that I go the back way.

Even though I did go the back way, Mr. Raney still saw me and tried to follow me.

Q Okay. But, this dueling cars, Mr. Windle was trying to block Mr. Raney from traveling down the roads of the State of Florida; right?

A Yes.

Q Okay. And, did you ever report this incident, this alleged incident were [sic] allegedly Mr. Raney pointed his finger at you? Did you ever file a report with any police department of the State of Florida?

[p. 109] A No.

Q Okay. So, you didn't and the reason you didn't is you were't [sic] that scared; right?

A I was scared, but, I mean, somebody pointing his finger at you, I didn't know that was illegal. If he had pointed a gun at me, I certainly would have called the police.

Q One last question, do you recall the day of the week that you allegedly saw Ed Martin in front of the Aware Woman's Clinic?

A No, sir, I don't.

MR. WEISS: Nothing further, Your Honor.

THE COURT: Redirect?

MR. CADLE: Your Honor, may I cross-examine?

THE COURT: Sure.

MR. CADLE: For the record, Your Honor, my name is Bruce Cadle, defendant in this proceeding. I'm representing myself today merely because I've not had time to get counsel. I was served this paper Friday night.

And, I'm not privy to the second motion that was filed today.

THE COURT: Well, we're not proceeding on that.

CROSS-EXAMINATION

BY MR. CADLE:

[p. 110] Q Mr. Snydle, the documents that have been discussed today, there was, I believe, a wanted poster, a flier, and distributed a letter with attachments.

Do you have any factual knowledge that I have any involvement in authoring those documents?

A Not in those, no.

THE COURT: Mr. Cadle, I'm sorry. Were your [sic] referring to the exhibits?

MR. CADLE: To the exhibits that have been presented.

Q Do you have any factual knowledge that I have directed or instructed anyone else to prepare those documents?

A No, sir.

Q Okay. And, what was the date, to your knowledge, of this court's order?

A September thirtieth.

Q September 30, 1992?

A Yes.

Q Okay. You have described the attitude, the physical presence of patients that have come in to seek your services. Have any of those patients, and we're not seeking names, have any of those patients ever testified to that because of my personal activities outside of Aware Woman Clinic in Melbourne, that they are suffering any of these signs that you have seen?

[p. 111] A Did they say your name specifically?

Q Yes, sir.

A No.

Q So, no one has pinpointed me and said that I have caused them anxiety, stress, high blood pressure, any of the things that you have mentioned?

A I don't know exactly how to answer that. If you are one of three people out there yelling and screaming and they come in and say those people out there –

Q No one has mentioned me by name –

A No.

Q – at all? Thank you. Or pointed to me in your presence and said that man?

A That's correct.

Q Okay. Thank you. You described an incident at the Comfort Inn –

A Yes.

Q – in Melbourne. And, what was the date of that incident?

A I don't know. It was approximately a month ago.

Q Was it a week day or a weekend?

A It was a week day.

Q A week day. And, you said I was physically present that day?

A You were there present the following morning.

[p. 112] Q At the Comfort Inn?

A You were outside the Comfort Inn, yes.

Q Okay. And, what was I doing? Could you describe that?

A I believe you were holding a sign.

Q Holding a sign?

A Right.

Q Could you describe how far away from the Comfort Inn was I?

A There was a whole gauntlet of people running down the driveway to Wickham Road. The Comfort Inn is back from Wickham Road quite a distance. And, there was a bunch of people lining that driveway.

So, where exactly you were – I think you were at the curve. So, I, you know, I can't estimate how far that was. Perhaps a hundred feet, two hundred feet.

Q A hundred feet, two hundred feet –

A A hundred feet –

Q – from the hotel?

A Right.

Q You never saw me inside?

A No. I did not see you inside the hotel.

Q Did I say anything to you?

A I don't know. I mean everybody was shouting and yelling. So, I assume that you were one of those people –

[p. 113] Q You saw me out on the sidewalk somewhere a hundred, two hundred feet away from the hotel –

A Yes.

Q – holding a sign?

A Right.

Q You mentioned that my wife was there.

A Yes.

Q Could you identify her for the court?

A I saw a picture of her at the clinic. And, I don't recognize her in the crowd here.

Q So, you are basing a picture at the Aware Woman Clinic –

A Yes.

Q – that's stated to be my wife?

A Yes.

Q Have you ever met my wife?

A No, I have not.

Q And, if I told you that she was in bed asleep that day, would you have any problem with that? Why would you have a problem?

A I wouldn't have a problem with that. But, you know, I identified her from a picture. When they got to the clinic they showed me, you know, I identified several people who were confronting me or accosting me.

And, they said, well, look through these pictures. [p. 114] And, identified two people in there. One they said was your son and one they said was your wife.

Q And, what did my wife do on that day?

A She was telling me that I performed an abortion on her and I could not look her in the eye and why

couldn't I look her in the eye and that I'm a criminal and that I'm this and I'm that and I'm a child killer and I can't look her in the eye.

Q How old would you guess my wife to be?

A I have no idea. I would estimate somewhere – I can't estimate.

Q How close was she during this confrontation?

A She was standing to my left leaning over the counter that I was leaning over trying to check out.

Q So, she was a foot away? Two feet away?

A Probably two feet away.

Q How long was this encounter?

A The encounter was approximately three to four minutes.

Q Three or four minutes?

A Right.

Q You have no earthly idea how old she might be.

A I would not like to quess [sic] a woman's age, no.

Q That's probably wise, a wise decision. Did she –

A She was not an old woman.

[p. 115] Q Not an old woman. She'll be pleased to hear that. What color hair did she have?

A Blond.

Q Blond hair. What color eyes? Do you recall?

A I don't.

Q Do you remember what she was wearing?

A No. She was a little bit chubby, I would say, you know, not slim, not heavy.

Q And, what height?

THE COURT: She may not be pleased to hear that.

THE WITNESS: I'm sorry. That's why I used the word chubby, Your Honor.

Q And, what height would she –

A Well, she was leaning over the desk. I would assume she was about five foot five, five foot six. I don't – I can't really tell.

Q Okay. And, did you, at any time, see me direct her or instruct her to come and confront you in this manner?

A No.

Q You had described earlier some actions by someone you believe is my son. How would you identify my son?

A He was very slim. I –

Q How would – excuse me. How would you know who my son is?

A Again, I said that when I got to the clinic, they [p. 116] said to me who were some of these people who were in the lobby. In going through the pictures, I pointed out several people and they named whoever they were.

Q Did you see me, this young man that you believe was my son, did you see me at any time instruct him or give him any direction as far as any actions related to you?

A No.

Q So, I was a hundred or two hundred feet outside the hotel. But, people you believe, because of pictures shown to you at Aware Woman Clinic to be my wife and my son, you believe confronted you?

A Correct.

Q But, I was not involved in that?

A I did not see you there, no.

Q Did you see me distributing leaflets, the leaflets that were described earlier?

A No.

Q You described earlier that, I believe you said, that I have personally blocked your vehicle at Aware Woman Clinic once or twice since this injunciton?

A Yes.

Q The court order was issued? What vehicle were you driving at those times?

A Probably the Cadillac. I usually drive either that or the Subaru.

[p. 117] Q Is this a full sized Cadillac?

A Yes.

Q What speed would you be approaching Aware Woman?

A Quite slowly. I don't know, like turning the corner, I don't know, ten miles an hour. And, then as I try to get into the parking lot, there are usually people walking in front, so I have to stop.

Q Could you describe for the court this – You've described a parking lot. Is there a sidewalk in front of Aware Woman?

A Yes, there is.

Q Is that a public sidewalk to your knowledge?

A Yes. I would assume so.

Q Is that where people frequently picket by walking on the sidewalk?

A That's correct.

Q And, is this sidewalk separate from the driveway or parking lot area?

A What do you mean separate?

Q Is it connected to a driveway?

A It's all one continuous.

Q All one continuous.

A Right.

Q So, people walking in the driveway area would have also possibly been walking on the sidewalk?

[p. 118] A Yes.

Q And, would you typically believe with [sic] were you driving across a sidewalk, that you would need to stop for pedestrians?

A Of course.

Q That would be your normal behavior?

A Right.

Q Have you personally seen me stand – You say I've blocked your car before. Could you describe exactly what I did?

A Well, when you stand and you see that a car is coming, normally people try to get out of the way. You don't stand there and then turn and look at someone and just sort of stand there.

Q Could you describe what I've done specifically.

A That.

Q Stand there?

A Yes.

Q And, so exactly what happened? Could you describe for the court, you are driving ten miles and hour –

A No, no, no.

Q – in a full sized Cadillac.

A No, no, no. I'm driving about ten miles an hour as I turn the corner off Highway One on to whatever that road is in front of the clinic. And, as I try to get into the [p. 119] driveway I have to stop. As a matter of fact, I have to slow down significantly because there are people usually on both sides – not usually, but occasionally on both sides of the street.

Q So, there are people on both sides of the street. There's people in the driveway. There's people on the sidewalk –

A Correct.

Q – picketing.

A Correct.

Q And, you've singled me out of the crowd as standing in front of your vehicle? Exactly where was I on the incidences where I block your vehicle? Where was I?

A In front of the vehicle.

Q In front of the vehicle?

A That's correct.

Q And, did you come to a complete stop at that point?

A Yes.

Q And, then what happened?

A Then, eventually people move. I blow my horn. People are yelling at me. And, then I finally get through.

Q And, how long, on the incidence that you're describing, where I was involved, how long did I stand in front of your car?

A Thirty seconds.

[p. 120] Q Thirty seconds. You wouldn't have me confused with anyone else possibly; would you?

A I don't think so. I've seen you enough to know you.

Q So, if other people have told me that you have walked up to them and called them Bruce Cadle, would that surprise you with the emotion of the activity?

A No. There's one other guy, this Ray Unterberger or whatever it is, looks like a younger you, a little bit darker. And, at first I thought that was you about a year ago and I used to call him Bruce. But, then I finally made the distinction. Now, I definitely know who you are.

Q Okay. So, there's someone that you used to confuse for me?

A That's correct.

Q Someone who you've described their activities as being more violent than mine –

A Yes.

Q – in earlier testimony?

A And, vocal.

Q And, more vocal. How did you describe my activity towards you? My actions?

A Primarily vocal.

Q Primarily vocal. You said that the effects of this is anxiety, fear, concern for your life, pseudo violence, and anticipated violence.

[p. 121] A Correct.

Q Could you describe for the court what I've said that has caused that response?

A "We don't want you here in Melbourne. You're a murderer. You're a child killer. You're going to burn in hell."

Q Have you reported that? You believe that I've said those things?

A I know you've said them.

Q And, have you gone in and recorded that information, written it down, or how are you able to recollect that?

A I mean, you can recollect when people call you a murderer.

Q And, typically is this a crowd situation? You've described people yelling and screaming.

A On occasion it is a crowd situation. On occasion you have been there with maybe two other people.

Q And, that would be since September thirtieth of 1992?

A Yes.

MR. CADLE: Okay. I have no further questions, Your Honor.

THE COURT: Are there any other defendants present not represented by counse [sic] that –

MR. WEISS: I don't know if it's their intention to [p. 122] make Mr. Raney a defendant in this action. If not, I guess you've ruled we're not going to do number two today.

THE COURT: He claimed not to be a representative of any organization –

MR. WEISS: Okay.

THE COURT: – and he's not otherwise named in the complaint.

MR. WEISS: Okay. Nothing further.

THE COURT: Redirect?

MS. PATRICK: Pass the witness, Your Honor.

THE COURT: Pardon me?

MS. PATRICK: Pass the witness. No further – no redirect.

THE COURT: All right. May this witness be excused?

MS. PATRICK: He may be by our side, Your Honor.

MR. WEISS: Certainly.

THE COURT: Thank you, Doctor. We're releasing you from further attendance. You do remain under the rule of sequestration that says you will not discuss with others your testimony that you've given here.

* * *

[p. 123] CERTIFICATE OF REPORTER

STATE OF FLORIDA :
: ss:
COUNTY OF ORANGE :

I, Margie L. Breit, Notary Public for the State of Florida at Large, do hereby certify that the foregoing proceedings were reduced to shorthand in the presence of

the within-named parties and later transcribed; that the foregoing is a true and correct transcription of the excerpt of the proceedings as aforesaid.

I do further certify that this hearing was taken at the time and place in the foregoing caption specified and was completed without adjournment.

I do further certify that I am not a relative, counsel, or attorney for either party or otherwise interested in the event of this action.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my seal of office on March 27, 1993 in Orlando, Florida.

/s/ Margie L. Breit
MARGIE L. BREIT

My Commission Expires:
October 7, 1994
Commission No: CC053127

IN THE CIRCUIT COURT OF THE EIGHTEENTH JUDICIAL CIRCUIT IN AND FOR SEMINOLE COUNTY, FLORIDA

WOMEN'S HEALTH CENTER, INC., AWARE WOMAN CENTER FOR CHOICE, INC., EPOC CLINIC, INC., AND CENTRAL FLORIDA WOMEN'S HEALTH ORGANIZATION, INC.,	CASE NO. 91-2811-CA
Petitioners,	
vs.	
OPERATION RESCUE, OPERATION RESCUE AMERICA, OPERATION GOLIATH, ED MARTIN, BRUCE CADLE, PAT MAHONEY, RANDALL TERRY, JUDY MADSEN, AND SHIRLEY HOBBS,	
Respondents.	

BEFORE THE HONORABLE

ROBERT B. MCGREGOR

JUDGE OF THE COURT

A hearing in the above style cause was held at 1:30 o'clock p. m., on Monday, the 22nd day of March, 1993, in the Courtroom of the Seminole County Courthouse, Sanford, Florida, before Margie L. Breit, Notary Public for the State of Florida at Large.

APPEARANCES:

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PLAINTIFFS' EXHIBIT NUMBER THREE 132

[p. 126] WHEREUPON:

The following proceedings were had:

THE COURT: All right. Call your next witness.

MR. D'ALEMBERTE: Excuse me, Your Honor, Captain Gary Allgeyer of the Melbourne Police.

WHEREUPON:

GARY A. ALLGEYER

a witness herein, having first been duly sworn, was examined and testified as follows:

DIRECT-EXAMINATION

BY MR. D'ALEMBERTE:

Q Okay. Captain Allgeyer, if you'll give us your name, address, and occupation, sir.

A Okay. My name is Gary A. Allgeyer. My address is 650 North Apollo Boulevard in Melbourne, Florida.

MR. D'ALEMBERTE: Your Honor, if court and counsel would permit it, I'll lead Captain Allgeyer through his history, if there is no objection.

THE COURT: If it's preliminary sure. Captain Allgeyer, if you would spell Allgeyer.

THE WITNESS: A-l-l-g-e-y-e-r.

THE COURT: G-u-y –

THE WITNESS: E-y-e-r.

[p. 127] THE COURT: E-y-e-r.

MR. D'ALEMBERTE: Your Honor, I may have put a witness list is one of the documents I put up there. It maybe helpful to you.

Q Captain Allgeyer, I understand that you are a graduate of Florida State University in criminology?

A Yes, sir.

Q You have a master's also in criminal justice from Rollins College?

A Yes, sir.

Q And, that undergraduate degree was in 1974 and masters in 1978?

A That's correct.

Q Since that time you've been on the Melbourne Police Department –

A Yes, sir.

Q – for some years. Serving first as a patrolman from seventy-four to seventy-six. After two years you were promoted to sergeant. You worked with the records training program during that time. Several years later you were promoted to lieutenant with the patrol division where you were a watch commander during that time; is that correct?

A Yes, sir.

Q And, in 1980, you took charge of the training program and internal affairs?

[p. 128] A Right.

Q And, became a captain in 1988 and in charge of the patrol division and later support services. And, in 1991 came back to the patrol division; is that correct?

A Yes.

Q And, you now are second in charge of the Melbourne Police Department?

A That is correct.

Q So, there are three captains in the Melbourne Police Department and you are the senior and the person who would be in charge if the chief of police were out of town or away?

A Yes.

Q Is that correct? Now during the time that there have been demonstrations at the Aware Woman Clinic, have you had any contact with those demonstrations?

A Yes, sir.

Q Going back to what year, sir?

A Back to 1989 where we had a large demonstration.

MR. WEISS: Your Honor, I'm going to interpose an objection. What happened in 1989 is absolutely irrelevant to the proceedings here. If we could go from the date of the order forward, that's fine. What happened three years prior to the order –

MR. D'ALEMBERTE: Counsel, I'd be delighted to skip over this. I frankly wanted to show his long term

[p. 129] contact with demonstrations to demonstrate his expertise.

If you will accept him as a guy to give an expert opinion, I'll be happy to skip over all that.

MR. WEISS: Your Honor, I can stipulate he's a policeman. But, what happened in 1989 and between forces unknown is irrelevant to the sanctions sought by your order.

THE COURT: But, he's qualifying him to give expert opinion based on experience. I don't know what his expert question is, but that's what I understand the inquiry to be.

MR. D'ALEMBERTE: That's correct, your Honor. And, the area I would like to qualify the captain, Your Honor, is in the area of police procedures in trying to have orderly demonstrations which are not threatening to the public safety.

THE COURT: Yeah.

MR. D'ALEMBERTE: That's the basis.

THE COURT: As a basis for qualification you may inquire.

MR. D'ALEMBERTE: That was my purpose.

THE COURT: It need not be evidentiary.

MR. D'ALEMBERTE: Again, with counsel's permission, I'll lead through this. If I'm going into territory he doesn't want me to, I'm sure he'll object.

[p. 130] THE COURT: You can depend on it.

Q You have been then – You have been involved with demonstrations at the Aware Woman Center since 1988; is that correct?

A Yes, sir. Everyone that they've had.

Q Okay. And, during that period of time, have there been a considerable number of demonstrations?

A Not considerable between 1988 and it would have been January eighteenth of this year. There was approximately two situations where in 1989 we arrested a hundred and forty-two people. And, in 1991 we arrested thirty people.

Q All right, sir. Have you been involved in other demonstrations or public events, crowd control activities and so forth in the City of Melbourne during your tenure?

A Several.

Q And, the Melbourne Police Department, are you the person who is turned to to take care of these kinds of procedures in your job?

A Yes, sir.

Q Now, have you studied crowd control and civil disobedience demonstrations?

A Yes, I have.

Q And, have those studies been made both at university context and special training schools?

A Yes, sir.

[p. 131] MR. D'ALEMBERTE: Your Honor, I would tender Captain Allgeyer for the purposes indicated earlier as an expert witness.

THE COURT: Do you wish to voir dire?

MR. WEISS: No, Your Honor.

THE COURT: Do you have any objections?

MR. WEISS: No, Your Honor, if he's – what we're saying is this guy knows how to handle crowds. He's an expert in handling crowds.

MR. D'ALEMBERTE: Demonstrations, that's right.

MR. WEISS: I mean, it sounds like he knows what he's talking about when it comes to handling crowds.

THE COURT: You may inquire of him in his area of expertise.

MR. D'ALEMBERTE: Thank you, Your Honor. And, I'll come back to those expert opinions in a moment.

Counsel has indicated he has no objection to our using Plaintiffs' Exhibit A, the sketch which is before Your Honor, and as a backup, counsel –

MR. WEISS: No objection to this.

MR. D'ALEMBERTE: May we enter this into evidence?

MR. WEISS: No objection to this. It appears to reflect the premises.

MR. D'ALEMBERTE: Your Honor, I will represent to counsel and Captain Allgeyer, I think will [sic] agree that [p. 132] Plaintiffs' Exhibit B is actually a sketch taken from Captain Allgeyer's file, a sketch of the premises. It gives the actual distances and so forth and might

be helpful to the court at some point, Your Honor. It would backup this sketch which is just rough and we can use –

THE COURT: If you'll get the witness to adopt it as resembling the area.

MR. D'ALEMBERTE: Yes, sir.

Q Captain Allgeyer, counsel has stipulated to the introduction of Plaintiffs' Exhibit B for identification, which is the sketch taken from your files. Is that –

A Yes.

Q – taken from your files?

A Yes.

Q And, the sketch, Plaintiffs' Exhibit A, can I move that around for you –

A Yeah.

MR. D'ALEMBERTE: Now, may I hand this to the clerk for marking?

THE COURT: Yes, please.

(Whereupon, Plaintiffs' Exhibit Number Three was admitted into evidence.)

Q All right, now. If you would now notice, Captain, just describe to us the layout of the Woman's Aware Clinic in Melbourne, Florida.

[p. 133] A Okay. This is U.S. Highway One. This would be in a northbound direction, southbound direction. The Aware Woman Center is located on Dixie Way. I believe the address is 1615, if I'm not mistaken.

The clinic has the building, parking lot and then a small parking lot on its property with the property line about half way between this driveway where it's located. The rest of that property between the lot line and the roadway would be considered public right-of-way.

The area to the west of the clinic is residential. And, to the east would be Highway One. So, it's a fairly quiet area and not a whole lot of room between the clinic and Dixie Way which is a residential street.

Q Captain, there are two areas indicating parking. Do you know what those parking facilities are used for?

A Yes, sir. This parking area is utilized by the employees of the clinic.

Q That's the smaller one, for the purposes of the record, it's the smaller area?

A That's correct. The larger parking lot is utilized by the clients of the clinic, where they park when they arrive at the clinic.

Q Okay. Now, are they so designated or it just happens that the employees get there first and fill up the small lot?

[p. 134] A That's basically it, yes, sir.

Q Now, Captain Allgeyer, you've indicated there was some demonstrations going back as early as 1988. But, I'm trying to bring your attention to demonstrations taking place since September thirtieth of 1992.

Have you known of some – first of all, any incidents at the clinic during that time?

A September thirtieth?

Q Of 1992, yes, sir.

A We've had a variety of different incidents at the clinic. Basically the ones that we've had was eighty-nine and then in ninety-one.

Q Was there some problem at the clinic in mid-December, 1992?

A Yes, sir.

Q And, what was that?

A We had an incident where someone took butyric acid and pumped that acid underneath the door and utilized Super Glue inside the locks.

Q All right, sir. Now, –

THE COURT: What kind of acid?

THE WITNESS: Butyric acid, it's used by bee-keepers. And, the stuff smells so bad that it keeps the bees away when they clean out the honey out of the hive.

THE COURT: Spell that for me, please.

[p. 135] MS. JOY: B-u-t-y-r-i-c.

THE COURT: Thank you.

Q Captain, I'm not sure you've seen this document, but let me show you Plaintiffs' Exhibit U for identification and ask you if you are familiar with that document? It's at least got the spelling of the acid on it.

A I'm not familiar with this document, but I am familiar with a document similar to this.

Q Okay. And, the document that is similar to this, is that an analysis of the acid?

A Yes, sir. It was passed around to all my police officers in case they came in contact with it.

Q All right, sir. Now, –

THE COURT: Let me ask what the Super Glue does to the locks?

THE WITNESS: Well, they utilize a needle similar to a syringe and place that inside the lock and then squirt Super Glue it the lock. What that does is it fills the lock up and that Super Glue has a fast drying time. And, it enables the person who has the key to operate the lock.

THE COURT: Enable the person?

THE WITNESS: No, makes them where they cannot use them.

THE COURT: Disables them.

[p. 136] THE WITNESS: Disables, that's correct.

Q All right. Now, moving into January of 1993, did I understand you to say that there was some escalation of activity?

A Yes, sir. On January eighteenth, the Operation Goaliath and Operation Rescue started an Impact Training in the City of Melbourne.

Q What is Impact Training? Do you know, Captain?

A Yes, sir. It's a week long – Well, it's twelve weeks. Each week they take a different type of subject and they train on that.

I think presently they plan on ending their training on the ninth day of April, which will make up the twelve weeks.

Q All right. Now, where did you learn about the activities of Operation Goliath and Operation Impact?

A Well, some of it we had discussions with both Mrs. Windle, prior to the impact training. We also had a conversation with Mr. Bruce Cadle prior to the impact training.

A lot of information was gained during those meetings. A lot of information was provided from other agencies to provide us updated information on what possibly maybe taking place.

Q All right.

[p. 137] A We do not have the full extent of what their training covers. But, we have somewhat of an idea.

Q All right. Now, if you've also seen statements by Mr. Cadle?

A Yes, sir.

Q All right. Now, relying only on statements made by Mr. Cadle or other people named as defendants in this case, what is your – what have they told you about what this impact training does?

MR. WEISS: Your Honor, I'm going to interpose an objection. I know I need – we need to speed this up. When we say other people –

THE COURT: Yes.

MR. WEISS: – if it's Ed Martin or Judy Madsen, I'd just appreciate the courtesy of identifying them.

MR. D'ALEMBERTE: I think that's fair. Let's see if we can get some of that out of the way. It might help counsel's exercise program.

Q Have you received any information about impact from Mr. Martin or Ms. Madsen?

A No, sir.

Q Or Shirley Hobbs?

A No, sir.

MR. WEISS: Thank you.

Q And, so you did receive information from Bruce [p. 138] Cadle?

A Yes, sir.

Q Did Bruce Cadle identify what organizations he was involved with when he gave you this information?

A Well, he told us, we know from past experience that he's involved with Operation Goliath. And, also he represented himself as being a member of Operation Rescue.

Q All right. What did he tell you about what the program was going to consist of?

A Well, basically that each week they would have a different suspect – subject taught by a separate individual each week. So, they would bring people in and from the national organization of Operation Rescue to teach a different subject?

Q What subjects were to be covered, if you gained that knowledge from talking to Mr. Cadle?

A One of the subjects he talked about was how to file lawsuits. And, they were going to spend some time at the county courthouse learning how to file lawsuits. Also how to file civil rights violations against police officers was also discussed.

Q And, were there any other topics that were – that he discussed in the impact training?

A Yes. Mr. Cadle told me over that week that or over the twelve weeks, there would be a rescue at the clinic. Mr. [p. 139] Cadle would not tell us when. We tried to talk to him and ask him if he would let us know so we can do it in a fashion that would possibly help each other.

He said, no, only if we would release anybody that's arrested on R. O. R., on their own recognizance. I told Mr. Cadle we do not deal when it comes to making arrests.

THE COURT: I'm sorry. Captain, did he indicate what a rescue operation is?

THE WITNESS: Yes, sir. Mr. Cadle and Mr. Al Monroe (phonetic) who was also there, but is not in the courtroom, stated that their main intention of being up there on any day when there is a surgery day is to buy time as to keep the people that want to visit that clinic away.

And, the more time they can keep them from entering that building or the parking lot to be a client of the clinic, the more babies they can save.

And, a rescue would be a full-fledged entry onto the property and a blockading of the doors.

Q When you collected information on this impact training, did you learn where the impact training was actually taking place?

A Yes, sir.

Q And, where was that?

A It's at the Tabernacle Church on, I believe it's Ferndale Avenue in Melbourne, Florida.

[p. 140] Q And, could you describe that church to us in terms of size and number of parishioners?

A The church is a very large church located at the intersection of Ferndale and Arroya (phonetic) Road. As far as the number of people that attend that church, I have no idea.

Q How far is this from the Aware Woman's Clinic?

A The Aware Woman's Clinic, it's approximately a mile and a half, two miles.

Q All right. Thank you. When you collected this information, did you report to the police chief of Melbourne, Chief Chandler (phonetic) with the information?

A Yes, sir.

Q And, following your report to Chief Chandler was there some memorandum prepared –

A Yes, sir.

Q – about impact training and its consequences for the Melbourne Police Department?

A Yes, sir.

Q And, did you participate in the drafting and preparation of that memorandum?

A Yes, sir, I did.

Q Let me show you Plaintiffs' Exhibit ZZ for identification. It is a two page memorandum with a map and ask you if you can identify that.

[p. 141] A Yes, sir. This is – This is a memorandum that was prepared by myself and the chief. And, it's given to each officer that is assigned to the clinic usually on Saturday to let them know the department's position on how to handle the situation at the clinic.

Q Now, Captain Allgeyer, you received a subpoena today? You are here pursuant to a subpoena and you've produced the documents; is that correct?

A Yes, sir.

Q And, that document, Exhibit ZZ was taken from your files?

A Yes, sir.

Q And, those files are maintained in the regular course of police business?

A Yes, sir.

MR. D'ALEMBERTE: Your Honor, we offer Exhibit ZZ for admission –

MR. WEISS: Your Honor –

MR. D'ALEMBERTE: – into evidence.

MR. WEISS: Your Honor, I would object at this time. The rules with respect to admissibility of public records exception, if it's a primary fact made by public officer in the performance of his public duties, that's one thing.

I've had an opportunity to review the document and [p. 142] we go far beyond any records of investigation and it goes into the exercise of judgment, discretion, talking about causes and possible effects, expressions of his own opinion, drawing conclusions.

So, he's going way beyond what would fall within the normal umbrella of public records exception and should not be admitted into evidence, because we're exercising judgment, discretion, expression of opinion, and conclusions. It's not a public record.

THE COURT: He testified that he was, in part, the author of the document. Mr. D'Alemberte seeks to have it admitted as a public record. I –

MR. D'ALEMBERTE: Your Honor – I'm sorry. I didn't mean to interrupt you.

THE COURT: No. Go ahead. I just don't know – I don't know that it's admissiblity [sic] depends on being a public record when, you know the author is presenting it.

I do feel it's germane or relevant to the inquiry if it goes to, you know, what efforts that the public authority

is doing in respect to the activities of the defendants in the area.

MR. D'ALEMBERTE: And, Your Honor, I think frankly my entry – of entry of it being a public document is gratuitous. It's already been authenticated. And, I don't have to rely on public record for authentication as [p. 143] Your Honor points out.

This is a memorandum – On what subject, if I may ask the Captain?

THE WITNESS: Impact training.

Q And, that's by what organizations, please, sir? And, that –

THE COURT: By what organizations, please, sir.

THE WITNESS: Does it relate to a specific organziation? [sic] I don't believe it relates to a specific organization. It just states how the police department will address any situation that may occur at the clinic.

And, it's directed to all personnel and copied to all the bulletin boards in the police department.

MR. D'ALEMBERTE: I tied that in, Your Honor, the earlier testimony that impact training was being participated in according to there evidence – according to information received by the captain, as I understand it from the captain. Let me ask it in the form of a question.

Q You received that information from Bruce Cadle that Operation Goliath and Operation Impact – or I mean Operation Rescue were involved in impact training?

A Correct.

THE COURT: But, how is it relevant to whether or not the court's injunction has been violated?

[p. 144] MR. D'ALEMBERTE: Your Honor, it indicates in memorandum form essentially what the captain has told us already. That is that he received information. And, we know part of that information came from Bruce Cadle, one of the defendants, that they intended to engage in certain kinds of activities.

Captain Allgeyer and the police chief of Melbourne thought it was important enough to put this in memorandum form and distribute it to all members of the police department that might go in contact with those demonstrations.

And, it's essentially the instructions to the police department about how to deal with these people who indicated to Captain Allgeyer they intended to break the law.

THE COURT: It's anticipatory; is it not?

MR. D'ALEMBERTE: It is in some measure, yes, Your Honor. It is and I will pick up from the date of this is actually, if I recall correctly, February eighteenth; is that correct?

THE WITNESS: Yes, sir.

MR. D'ALEMBERTE: And, pick up from that date and go forward. In a moment we'll have some video tape again to be shown of February twentieth, Your Honor.

You may want to actually look at the memorandum [p. 145] itself, Your Honor.

MR. WEISS: Your Honor, I have the same objection I had before. This is prejudicial. It's inflammatory. It's in anticipation of a problem. It doesn't have any bearing whatsoever on the conduct alleged to have been done by these specific individuals and therefore it's irrelevant.

THE COURT: I think I'm going to have to sustain that objection.

MR. D'ALEMBERTE: All right, Your Honor. May I just proffer relating to this document?

THE COURT: Surely.

MR. D'ALEMBERTE: May I retrieve the document? Your Honor, I'm not going to proffer because I think there's another way to get at the same issue.

Q In your discussions with Mr. Bruce Cadle or any other defendants other than the people you've already excluded as not having been a source of information, did you receive information that they would be experimenting with new tactics directed at the clinic?

A Yes, sir.

Q Now, did you find after February 18, 1993 that, in fact, there were some new tactics involved at the clinic?

A Yes, sir.

Q Could you describe those new tactics for us?

[p. 146] A One of the tactics was basically that the prolife people that responded to the clinic wanted to utilize the full extent of the city right-of-way.

What I put together was basically dividing the two groups with a neutral zone in the middle for police officers to be able to handle any situation that may occur between prolife and prochoice. When I did that, it worked very well.

But, as the crowds continued to grow on both sides, I had to do away with that neutral zone and just put one line of baricades [sic]. When I did that, I put baricades [sic] up and also provided an area here for the press. The prolife people –

Q That's indicating, I believe, the southeast side of the property?

A That's correct.

MR. WEISS: Southwest.

Q Southwest.

A Southwest.

Q Southwest.

A The prolife people or Operation Rescue demanded that they have the full extent to the city right-of-way. So, there were people going over baricades [sic] and everything else.

THE COURT: I didn't quite understand where your baricades [sic] were.

THE WITNESS: The baricades [sic] – The city or the property line runs from west to east half way between [p. 147] these two driveways for the parking lots.

THE COURT: There's a sidewalk in there somewhere?

THE WITNESS: There's a sidewalk that runs from this parking lot to this parking lot. It's very short. All the other parts here are – This is grass. This is driveway, and then a short parking – or sidewalk. So, there's only a little bit of city right-of-way available.

What we tried to do is provide reasonable accomodation to the protesters. And, I divided that up for prochoice and then the prolife people. But, there wasn't any prochoice people at the time. So, they went on and pushed the baricades [sic] and went in the press area and took over.

There were three people that were placed under arrest. And, the police chief responded and that was changed. We figured we didn't have enough probable cause at the time to actually charge them.

And, since then I have had the city attorney review that, and he has said under separate conditions –

MR. WEISS: Your Honor, a certain amount of hearsay, but the police, what their counsel's opinion was to them is really constituting hearsay.

THE COURT: Yeah. Sustained.

MR. D'ALEMBERTE: May I respond to Your Honor's inquiry?

[p. 148] THE COURT: Yes.

Q You mentioned a neutral zone. What is a neutral zone?

A A neutral zone is approximately four foot wide and it's baricades [sic] on both sides. And, that keeps the two parties apart from each other and also provides a space for the police officers to be able to walk back and forth and take care of any problems that may exist between the two parties.

Q Now, Captain, when there are large numbers of demonstrators there, and I'm talking about let's say this year, 1993, large numbers of demonstraters there, does it make it difficult for traffic to go down that road, which I believe is Dixie Way?

A Yes, sir. It does.

Q Can you describe that difficulty for us?

A Well, basically we had to have officers up and down that road to make sure nobody crosses the road as we had cars going down one side of it. Also, if we had an ambulance or fire truck that went down the road, it would present a problem to that emergency vehicle.

We have written tickets for people that have attempted to obstruct traffic. And, one case I had a child that ran across from this vacant lot where the prolife people park. We had a child run across the street and almost get hit by a car. And, that was about three weeks ago that happened.

[p. 149] Q All right. Now, the vacant lot you pointed to, is that a vacant lot that is available for prolife forces to use?

A Yes, sir. The owner has given them permission to park.

Q Okay. And, do they actually park there and sometimes stage demonstrations from that vacant lot?

A Well, not from the vacant lot. There is room on the right-of-way on that side of the road to accommodate them.

Q Captain Allegeyer, is a neutral zone something of value to you now in the present situation as we find the forces being assembled on each side at the Aware Woman's Clinic and demonstrations at this time?

A Yes, sir. It is.

Q Okay. Now, is there any difficulty with people being heard or seen if they were located across the street from the clinic?

A They're quite vocal. You can hear them across the street.

MR. WEISS: Your Honor, I'm going to interpose an objection. We're going into issue number two seeking some modification. I think what we're talking about today is if these folks violated your order.

What may have occurred and what they like is to push us across the street and push us out of town is irrelevent before the considerations here.

[p. 150] Q Is it possible for a large number of people who are coming for demonstrations in recent weeks to be accommodated on that narrow strip which is south of the property line of Aware Woman Clinic?

A Yes, sir.

THE COURT: North of the right-of-way? North edge of the right-of-way?

MR. D'ALEMBERTE: Yes, sir.

Q Is it possible for them to be accommodated there?

A Yes.

Q Without flowing into the road?

A Excuse me, that was on the north side of the road?

Q North side, yes, sir.

A No.

Q When large numbers of people come, if they're allowed on the north side of the road and spill into the right-of-way, is egress and ingress limited –

MR. WEISS: Objection.

Q – to the Aware Woman Center?

MR. WEISS: It calls for a hypothetical.

MR. D'ALEMBERTE: It's a yes or no answer, Your Honor. That's not a leading question.

MR. WEISS: Hypothetical.

MR. D'ALEMBERTE: Or hypothetical.

MR. WEISS: Hypothentical [sic]. This didn't really [p. 151] happen, is what I'm getting at.

MR. D'ALEMBERTE: I see your point, counsel. Let me make sure the predicate is set.

Q Have there been large numbers of people coming to demonstrations at various times at the Aware Woman Center in this calender year?

A Yes, sir.

Q And, can those – that number of people be accommodated on the north side of Dixie Way without spilling over into the street?

A On the last time that we had a protest of area clinics, we had approximately two hundred people on the prolife side and two hundred people on the prochoice side. That is a small area of property and very hard to accommodate that number of people on the north side of that road.

MR. D'ALEMBERTE: All right. Let me just check for another exhibit, if I may.

THE COURT: Captain, would they remain on the right-of-way or is there some sort of demarcation indicating the edge of the private property?

THE WITNESS: Sir, we have removed the barricades [sic], taking half of the right-of-way on that side of the street providing room for the prochoice people to exercise their rights. And, then we also have the same amount of property, right-of-way for the prolife people [p. 152] to exercise their rights.

THE COURT: But, you are dealing with public right-of-way again. Is there any – any line that indicates where private property begins and right-of-way ends?

THE WITNESS: Yes, sir. There is.

THE COURT: What is that line?

THE WITNESS: That line is painted on both of the driveways to each parking lot. And, like I explained, it's half way, it's in the middle of each driveway.

THE COURT: It would be the dotted line that's shown on this drawing?

THE WITNESS: Yes, sir. That's correct.

MR. D'ALEMBERTE: You want me to take that to him, sir?

THE WITNESS: That is correct.

THE COURT: You say that there is a painted line on those two driveways where that dotted line is?

THE WITNESS: That is correct.

THE COURT: All right. Is it understood that those who are demonstrating have to stay on the street side of that line?

THE WITNESS: That's correct, sir.

THE COURT: Do they?

THE WITNESS: They have so far, yes, sir.

THE COURT: All right.

[p. 153] Q All right. But, in staying on the street side of the line, do they then crowd into the public street?

A Yes, sir. There is a spill over into the street plus the pedestrian traffic from the vacant lot where they park over to the north side of the road provides quite a bit of movement back and forth.

Q And, during demonstrations have you – demonstrations at which Mr. Cadle was present, have you noticed that people were in the street, in fact?

A Yes, sir. And, I've discussed that with Mr. Cadle.

Q Have you asked Mr. Cadle not to have people in the street?

MR. WEISS: Your Honor, I again want to interpose an objection to people – There are two crowds. We have the proaborts and we've got the prolife. And, I want to make sure which people we're talking about crowding into the street. I don't think that distinction is clear in the question.

MR. D'ALEMBERTE: All right, sir.

THE COURT: If you would clarify it, please.

THE WITNESS: It would be prolife.

Q Have you discussed that with Mr. Cadle?

A Yes, sir. I have. I told Mr. Cadle on several occasions that my concerns are somebody being struck by a motor vehicle, that the issue of abortion is an extremely [p. 154] emotional issue, anybody that may be a client of the clinic that goes in on surgery days is under extreme emotion, and I'm concerned about people approaching these cars and they go down the street and into the driveway and possibly a person getting struck.

Q And, what was Mr. Cadle's response?

A Those people do what they want to do, basically.

Q All right. Now, what –

THE COURT: Let me understand, would they leave the grass or that part of the right-of-way other than the paved right-of-way and approach vehicles as they were coming down the street?

THE WITNESS: No, sir. They – Well, they're in the street and they have to move out of the way basically as a car comes down.

Also the paved portion of the driveway, they have them utilizing the right-of-way on that paved portion. If a vehicle is blocked as their sidewalk counselors approach the vehicle and attempt to stop it, those people are warned, warned more than once. And, when then after that they're written traffic citations for obstructing traffic.

THE COURT: Warned of what please?

THE WITNESS: To please do not block traffic.

Q Has that conduct continued on after warning?

[p. 155] A Yes, sir.

Q And, has it been repeated on successive days after warnings have been given?

A Yes, sir.

Q And, has Mr. Cadle himself been warned?

A I have talked to Mr. Cadle about it because he has a tendency to be in charge of what goes on out there.

And, I did let him know that I'm concerned about his sidewalk counselors.

Q All right. Now –

THE COURT: Sir, just a minute. Now, it's not clear to me and I doubt if it's clear on the record, but when you say sidewalk counselors, again that term has not been defined to me.

But, as cars were going down the street, they would approach cars from off of the paved right-of-way on to the paved right-of-way with some attempt to block the forward motion of cars while others would approach the cars on the side to communicate with the occupants of the car?

THE WITNESS: Well, basically what that is –

THE COURT: Just answer me yes or no, please, if you could, sir.

THE WITNESS: Yes, sir.

THE COURT: Thank you. Okay. Now, you can explain.

[p. 156] THE WITNESS: Okay. Now, what they do is they walk up to a car and attempt to hand literature through the window to the person driving the car. When they do that, it has a tendency for the driver to stop to see what – to see who's approaching.

In some cases the drivers have sped up and pulled into the parking lot at a high rate of speed to try to get away from those people because they're scared. That I consider obstructing traffic and they were issued citations.

Q And, has that conduct continued on in January, February, March?

A Yes, sir. We've written the same people many tickets.

Q All right. Now, Captain, have there been some, in some incidents that have also led to police investigations and the filing of police reports at the clinic?

A Yes, sir.

MR. D'ALEMBERTE: If I may have exhibits, my old eighteen through twenty. Now, Your Honor, these are now marked as Defendants', [sic] Exhibits Q, R, S, and T.

If I may identifity them for the record, Exhibit Q is relating to the incident that occurred on December 15, 1992 already described by the officer. R, January of 1993. S, February, 1993. And, T a March, 1993 incident.

[p. 157] Q Let me just ask you if you can identify these as being true copies of police reports?

MR. WEISS: May I take a look at them, please?

MR. D'ALEMBERTE: Sure. Counsel, I don't think there is any one of your clients identified in any of those. I'll make that representation to you and if you tell me you find any, I'll even change it.

If I may continue on, Your Honor, I don't need to introduce those right now. I just wanted to identify them.

THE COURT: Yeah. Go ahead.

Q Since February 18, 1993, the beginning of the impact training, can you describe for us the – any change,

if there were any change in attitudes of the people who are engaged on both sides of the demonstrations at the Aware Woman's Clinic in Melbourne?

A That was since January eighteenth?

Q Uh-huh.

A I would say that tempers on both sides, the fuses are running very short. They're more vocal than they were at the beginning. At the beginning they were very peaceful.

There were fewer prochoice people that were even there. Just some escorts in the parking lot.

And, the prolife people, their numbers have increased just about each week. And, there are a lot of [p. 158] children present.

I think the incidences of reports even shows that there's more incidents of police related activities that has taken place there.

Q All right. And, those reports that you just referred to, would there be greater numbers of reports, for instance, in recent times than, let's say, back in 1992?

A Yes, sir.

Q And, is the situation at Aware Woman's Clinic more precarious today or less precarious than it was September 30, 1992?

MR. WEISS: Your Honor, I object to the form of the question. Is a situation more precarious is vague and ambiguous. You've got the proaborts and you've got the prolife. They're getting hot with each other. It has nothing

to do with whether or not my clients violated the injunction. I think it's irrelevant.

MR. D'ALEMBERTE: Your Honor, my purpose in asking him that is to find out whether we actually are dealing with something which has actually escalated since the injunction was entered. Rather than complying with the court's order, there's actually been an escalation since the court's order.

And, it goes, I would concede it would be very good evidence if we were seeking a modification at this point. [p. 159] But, it's certainly equally good evidence for purposes of showing disregard for the injunctive order and an attempt to block ingress and egress into that facility.

THE COURT: But, if they someway relate to the name defendants or their organization.

MR. D'ALEMBERTE: I thought I had done that already, Your Honor, and as –

THE COURT: Well, he uses the term prochoice without referring to any organization. That's a little confusing to me as to whether we're dealing with multiple organizations or –

MR. D'ALEMBERTE: Let me try this, Your Honor.

Q Captain Allgeyer, is it your understanding that there are organizations behind the – these impact demonstrations?

A Yes, sir. There is.

Q What is your understanding about the organizations that are behind those impact demonstrations?

MR. WEISS: Your Honor, what is the foundation of how he knows, before he goes into that.

MR. D'A' MBERTE: We've done it once, Your Honor, but we'll go do it again.

Q My understanding – did you not have a conversation with Bruce Cadle?

A Yes, sir.

[p. 160] Q Did Mr. Bruce Cadle tell you who was involved with the impact program?

A Yes, sir.

Q Did he indicate to you that Operation Goliath or Operation Rescue were involved in impact training?

A Yes, sir.

MR. D'ALEMBERTE: Your Honor, I think it's all repetitious. I've done it before.

THE COURT: All right. But, again, did he indicate to you what the distinction was between Operation Goliath and Operation Rescue, if there's one?

THE WITNESS: Not in that conversation, no.

THE COURT: More involved or less involved?

THE WITNESS: My understanding is that Operation Goliath is more on a local level. And, Operation Rescue is on a national level.

THE COURT: And, the relationship between the two, is there any direct relationship or are they separate organizations?

THE WITNESS: That I can't answer. I don't know for sure.

Q Did Mr. Bruce Cadle indicate to you he was active with both organizations?

A Yes, sir.

THE COURT: All right. Yes, you've covered that [p. 161] before and you may proceed.

Q All right. Now, when I refer to an impact demonstration, you understand what I mean and that has meaning to you?

A Yes, sir.

Q And, have the impact demonstrations raised the temper of the situation on the grounds at the clinic since February 18, 1993?

A Yes, sir.

Q Okay. And, have the activities of the impact demonstrations made ingress and egress more difficult?

A Yes, sir.

MR. D'ALEMBERTE: All right. Your Honor, let me check my notes for a moment.

THE COURT: All right. You had asked him about the reports. Are you tendering those?

MR. D'ALEMBERTE: Your Honor, let me – I will tender those, but limited purpose. I do not think that those reports will show violations of the injunctive order on individuals.

I think he has already testified as to some activity that it does indicate violations, but those are just – would indicate, if I may represent to the Court, some thefts, a criminal mischief, other activities that have taken place, some of it at the time of these [p. 162] demonstrations, some of it at times where no demonstrations were around, but increased criminal activity directed towards the clinic.

There are also at least two of those reports, Your Honor, which are incident reports claiming that someone associated with the prolife activity – prochoice activities had somehow offended someone associated with prolife. So, it is not all – we're not trying to point fingers at one direction or the other.

We're just trying to show the escalating activity. That's the only purpose we offer those exhibits there. We would offer them for that purpose.

MR. WEISS: Your Honor, I think it's irrelevant and immaterial. These folks are being charged with sanctions. Their names aren't present anywhere in any of these documents.

I think besides being irrelevant and immaterial, it's prejudicial and inflammatory in that it says this amorphous prolife group somehow these folks' activities are connected with the activities of my clients.

And, so without that nexus being shown, without my clients being named anywhere in here, I think it's irrelevant and immaterial to the issues here today.

THE COURT: Yeah. If –

MR. D'ALEMBERTE: Your Honor, it's not an important [p. 163] thing to me. I think he's already said it in his testimony. I think that was the point that we needed.

THE COURT: All right.

MR. D'ALEMBERTE: Let me just get this one minor point in.

Q Captain Allgeyer, at the time – at the event incidences of theft reported at the time these impact demonstrations have taken place at the clinic?

A Yes, sir.

MR. D'ALEMBERTE: That's all.

THE COURT: Theft of what, sir?

THE WITNESS: There was the theft of some stereo speakers that were placed on the exterior of the building. And, they were turned on during the surgery to drown out some of the yelling that the Operation Rescue and Operation Goliath people caused during their demonstrations. Those were removed from the building.

THE COURT: And, was that activity attributable to any of the defendants?

THE WITNESS: I cannot say for sure.

MR. D'ALEMBERTE: No charges were ever made on those, Your Honor, I believe.

Q Were there also some instances relating to a mischief to automobiles on the dates that these impact demonstrations in the calender year 1993?

[p. 164] A Yes, sir.

Q And, what were those instances?

A Several of the people from the –

MR. WEISS: Again, unless this is going to be tied to my clients in any way –

MR. D'ALEMBERTE: Again, no one was charge [sic], no culprit was found, Your Honor. I've only tied it to the impact demonstration. And, I think the only defendant that –

THE COURT: If it happened during the impact demonstrations, impact sponsored the demonstrations, then I think it's relevant.

MR. D'ALEMBERTE: Certainly circumstantial is all.

MR. WEISS: I don't think it's been demonstrated that impact sponsored any of these demonstrations, knew these people who was out there on the street, what organizations they were associated with. How does he know what – Does he know the members of the impact organization?

MR. D'ALEMBERTE: I've been over it three times, Your Honor.

THE COURT: Yeah. Overruled.

Q What were the incidents to the cars?

A Okay. Some of these prochoice people parked their vehicles in this vacant lot early one day. And, what happened [p. 165] was one lady made a complaint that

somebody tried to put a potato in her tailpipe. Another lady filed a complaint that her – all four tires had some roofing nails placed in them. Those police reports were taken.

MR. D'ALEMBERTE: Okay. That's all I have, Your Honor.

THE COURT: All right. Cross-examination?

MR. D'ALEMBERTE: Your Honor, May I return Exhibit ZZ.

CROSS-EXAMINATION

BY MR. WEISS:

Q Since the entry of this court's order of injunction, have you charged Judy Madsen, Ed Martin, Bruce Cadle or Shirley Hobbs with trespass of the clinic property?

A No, sir.

Q Since entry of this court's injunction in September, have you charged Ed, Judy, Bruce Cadle or Shirley Hobbs with obstructing the passage of any motor vehicle on the street?

A Yes, sir.

Q Okay. Who was that?

A Shirley Hobbs.

Q Okay. And, what was she charged with?

A Obstructing traffic.

Q Okay. And, that's a civil infraction?

[p. 166] A That's correct.

Q And, what's been the disposition on it? Do you know if she was convicted?

A I don't know. I know she's received more than one citation.

THE COURT: For the same offense?

THE WITNESS: Yes, sir. Separate days.

Q Did Ms. Hobbs refuse to accept and sign the traffic citations?

A At one time, yes, sir.

Q Did she subsequently accept the citations?

A On the date that that occurred the first time, she would refuse to sign the citations. It's the police department's stance that we will make an arrest on our terms, not on the protester's terms. The citation was voided. At subsequent times –

Q I want to make sure I've got that. The citation was voided?

A Yes, sir. She refused to sign it. The next charge to take place would be a misdemeanor charge of refusing to sign that citation. That ticket was voided and a misdemeanor charge was not placed on her.

And, the next time she was talked into signing the ticket.

Q Did she physically abuse, slap you, punch you, hit [p. 167] you?

A No, sir.

Q Did Judy Madsen, Ed Martin, or Bruce Cadle ever physically touch your or any officers in your presence?

A No, sir.

Q Now, the potato, did you take the potato in for fingerprints to see whose fingerprints were on it so you could track it down?

A No, sir. It was not.

Q Now, the roofing nails, did you take those in for fingerprints to see whose – maybe a proabort put it by accident under one of their guy's car?

A Normal procedure on a misdemeanor crime we don't do that. We have enough felony cases to keep us busy.

Q Now, you're in charge of planning and handling the operations for any disorder at this clinic; right?

A Correct.

Q That's your job?

A Yes, sir.

Q Now, are you competent to do that job?

A I hope so.

Q Okay. And, to today's date, every instance has been handled competently by the Melbourne Police Department; has it not?

A Yes, sir.

[p. 168] Q Do you have enough manpower on the Melbourne Police Department to control the situation in ever [sic] single instance from the date of his order to this date?

A Yes, sir.

Q Never called in the National Guard?

A We wouldn't call in the National Guard.

Q The Brevard County Sheriff's Department was not required?

A They were on standby, but not required.

Q Any amored [sic] personnel carriers, tanks?

A We don't have any tanks.

Q Now, you talked about this impact group. How many members are in this impact group? Do you know how many members?

A It's my understanding the impact training group has approximately twenty to thirty members that attend training. And, then they have their rallies on Friday night where they have anywhere from two hundred to four hundred people.

Q Now, those are rallies at church?

A Yes, sir.

Q Okay. Did you arrest anyone at the church for holding those rallies?

A No, sir. That's their constitutional right to have a rally.

Q Okay. Now, these twenty – I think you said twenty [p. 169] to thirty members of the impact group, do you know any association whatsoever between Judy Madsen, Ed Martin, and Shirley Hobbs in the impact training sessions?

A No.

Q Okay. Do you know anything illegal that is being instructed in any of those impact training sessions? Any illegal activities these folks are being told to engage in?

A Sir, I have no idea. It's a closed training session except for last week. They invited the press in.

Q Now, when the press was invited in, did representatives of the police department go as well so you could scope out and see what they were up to?

A We weren't invited in.

Q Did the representatives of the press record what they saw or put it in the paper?

A I understand on a scheduled basis, yes, sir.

Q And, did you read the reports of what was being taught in those sessions?

A I've watched the six o'clock news.

Q Okay. Did you and what you saw on the six o'clock news see any one at this impact training session training anyone to do anything illegal?

A Not in that space of time that they filmed, no.

Q Okay. Do you have any undercover operatives, I won't ask their names, that are investigating this [p. 170]

organization to see if they are engaged in any illegal activities?

A No.

Q Okay. Now, you talked about this neutral ground. What you are talking about is putting a neutral ground between the proaborts on the side of the clinic and the prolifes on the other side?

A That's correct.

Q What you're trying to do is keep two people who are diametrically opposed on a very sensitive issue, keep them apart so they don't start swinging at each other; right?

A I put together a plan that I thought would work very well. When we implemented the plan, in the newspaper the next week, and there were several fliers that came out through Operation Rescue, which was started by the impact team was that the Melbourne Police Department was regulating the ability of Operation Rescue to exercise their freedom or religion, and that is praying in the public right-of-way.

So, what they did is they basically tried to put us in the middle of this abortion argument and we didn't want to be there. So, the chief decided to move the baricades [sic] to the property line, which gives them all the right-of-way that they want.

Q All right. Now, did the representatives of the proabortions, they have escorts and burly NOW women that are [p. 171] helping the women take their bodies in so they can have the abortion procedure performed; right?

A Well, from the property of the clinic.

Q Now, do the – does the clinic prohibit the proaborts to be up on the clinic's property or is that okay with them?

A That's against the law to be trespassing.

Q Does the clinic ever instruct –

A Excuse me. Do you mean the proaborts to be on the property?

Q Right. Do they?

A Yes, they do.

Q So, they've got the access of the entire clinic property. And, the clinic has never come to you and arrest these proabortion people. They're trespassing. That's acceptable conduct; right?

You've never arrested a proabortion person for trespassing on the clinic?

A I only arrest people for trespassing if the owner of that property asks them to leave and they refuse. They would be placed under arrest.

Q Now, this screaming and yelling that takes place, do the proaborts, are they silent as lambs or do they raise their voices?

A At times they raise their voice.

[p. 172] Q Okay. And, have they ever raised their voice and increased the volume of sound at a time when patients were coming in to have an abortion procedure performed?

A Yes, sir.

Q Okay. So, there could be some tension associated with the event as a result of the altercation between the two groups; correct?

A That's correct.

Q So, in fact, the proaborts in yelling and screaming to the prolifes are elevating the tensions and increasing the sound; right?

A I would say that's a combination of both sides.

Q Okay. And, with the speakers that the Aware Woman's Clinic had, they had loud speakers out there that they blared sound at the prolifers; right?

A No.

Q What – Did you ever hear the speakers being utilized?

A For music.

Q On the building?

A For music.

Q So, is this an entertainment facility? Or what's the purpose behind the playing of the music?

A From my feeling, the music's not loud enough to drown somebody out if they wanted to scream.

[p. 173] Q Okay.

A I could hear the screams over the music, let's put it that way.

Q Okay. So, you've got speakers playing music. Is this rock music or we are talking classical? What kind of music?

A After a while I didn't even listen. I don't think it's hard rock. I think it's just easy listening.

Q Now, does the altercation between the proaborts and the – I want to get these names straight – the prolifes, does that altercation cause them to pushed into the twenty-four foot wide paved area?

A You mean the road?

Q Yeah. I mean because you've got more people than the property – than the right-of-way can handle; right?

A We had, at one time some people, prochoice and prolife people that shared the roadway. That was during the first protest they had I believe on January twenty-third.

Due to the crowds growing, we're trying to prohibit that and separate the groups. The original plan I had was dividing the the [sic] street in half, placing baricades [sic] on this half of the street and allowing the Operation Rescue and Operation Goliath to enter that baricaded [sic] section of the road and allowing this road between those baricades [sic] and the clinic, leaving that open for flow of traffic where it could not be [p. 174] interferred [sic] with.

Q Did you ever consider letting the proaborts be close to the clinic on the clinic's property and giving right to lifers access to the full public right-of-way, not blocking the street, but the sidewalk, the public right-of-way?

A What was that again?

Q Did you ever consider giving the proaborts access to the full clinic property, grass, everything up to the building so they could have the entire parcel belonging to whoever owns the property and letting the prolifers have the entire right-of-way?

A Yes, I did think about that. But, it doesn't work because at the property line to the clinic we have baricades [sic] and there were bushes between this parking lot and this driveway which does not provide them access on that clinic property. The only access they would have is this parking area here and this driveway and parking lot.

Q Okay. Anywhere from here up, from the hedge up, the proaborts could surround the whole clinic if they chose to; right?

A No. Wrong.

Q Why not?

A On this side of – along U. S. One, on the west side of the road, we have approximately five feet where they can walk up and down U. S. One. There is a ditch in back of the [p. 175] property. They do go along the back of the property, the prolife people and put fences up and yell over the fence – or put ladders up and yell over the fence at people – at clients as they pull in the parking lot.

On the west side of the road there is a six foot high fence, with the gentleman who lives in the house next door will not allow them on his property. So, they will be arrested if he sees them on the property and warns them to leave in one of our presence.

Q Do you ever see any of the proabortion folks with cameras?

A Yes, sir.

Q Okay. The proabortion folks have cameras?

A Yes, sir.

MR. WEISS: Excuse me just a moment.

Q When you said about the traffic citations being issued, you looked at this lady in the back, sitting in the back row; correct?

A (Nods head)

Q Okay. Do you know that that's no Shirley Hobbs or do you think that is Shirley Hobbs? Would you raise your hand? Do you know who that person is?

A Sir, I didn't write the citations. That was the lady that received the citations.

Q Okay. I guess she can't testify, but would you take [p. 176] my word for it, her name is not Shirley Hobbs. She's one of my clients. You don't know who she is; right?

A Her name is Shirley. If the last name is not Hobbs, I don't know –

Q Trust me. It isn't Shirley Hobbs. Now, why are the proabortion groups taking pictures of the anti-abortion groups? Did you ever ask them?

A Sir, everybody is taking pictures of everybody there.

Q Do they have their cameras right up in the face of the prolifers?

A They have them in the face of the prolifers. The prolifers have them in the face of the proabortions. They have them in the face of the police officers. The police officers are photographing everything. They spend more on cameras than just about anything up there.

Q Now, I believe you said that your police chief overruled your decision about putting the baricade [sic] between the two groups?

A No.

Q Oh, I know what it is. He overruled the decision about arresting them for taking over the press area.

A That's correct.

Q Okay. So, when they moved into the press area, the chief said, no, we're not going to prosecute for that.

A (Nods head)

[p. 177] Q Okay. Now, when traffic is going up and down Dixie Way, can you identify by name the persons in Dixie Way to associate them with the proabortion groups trying to escort them into the clinic from the prolifers who would hope they won't go in there?

A Sir, we don't allow anybody to interfer [sic] with that traffic, whether they're prolife or prochoice. That's the City of Melbourne's roadway. And, we will direct traffic, if it needs to be directed. They will not interfere with it.

Q Okay. Has that been a problem? Have you at all times been able to get the traffic down Dixie Way?

A At all times we have been able to. We have had to write some tickets.

THE COURT: Captain, is Dixie Way a through street? Does it go some place?

THE WITNESS: Yes. Dixie Way goes all the way west and there's a turn around to another street. The only access that you have is Dixie Way here and then the next street south is Old Colonial Way, which is like a horse shoe around to Dixie Way.

THE COURT: Okay.

THE WITNESS: So, the only access to the clinic is off U. S. Highway One.

MR. WEISS: Nothing further, Your Honor.

THE COURT: Redirect? I'm sorry. Mr. Cadle.

[p. 178] CROSS-EXAMINATION

BY MR. CADLE:

Q Good evening, Captain Allgeyer.

A How are you?

Q You mentioned earlier, Captain Allgeyer, that the same people have gotten many tickets. Was that for obstructing traffic?

A Yes, sir. That's all we've done as far as enforcment [sic] at that location.

Q Do you know how many tickets have been given out?

A I can't recall exact numbers, no.

Q Any idea?

A I would say there's at least four to five citations that have been written for obstructing traffic.

Q At least four to five. And, you believe that someone named Shirley Hobbs, although I can also personally attest that the lady in the back is not named Shirley Hobbs, you believe that some people have received many, I believe many was the word, many tickets to the same people?

A More than one, approximately two.

Q More than one.

A Yeah.

Q Captain Allgeyer, since the beginning of this court order September thirtieth, I believe, of 1992, and you've [p. 179] relayed information related to impact demonstrations. I believe you said that the impact training class started on January eighteenth of 1993; is that accurate?

A Yes.

Q On January twenty-third, the first Saturday, the first day of demonstrations at Aware Woman Clinic, approximately how many police officers were present?

A I utilized twenty-five officers initially. At noon I had to relieve some of those people because they were

scheduled to work the midnight shift. I called in another twenty-five. So, approximately fifty officers.

Q Fifty police officers throughout the day?

A Yes, sir.

Q Were there any arrests made?

A No.

Q No arrests. Were there any citations for blocking engress [sic] or egress?

A No.

THE COURT: That was January when, officer?

THE WITNESS: Twenty-third.

THE COURT: Saturday; is it?

THE WITNESS: Yes, sir.

Q In the Saturdays since January twenty-third, since these demonstrations began, what would be the average number of police officers present on Saturdays?

[p. 180] A Usually there's four officers, three of them are utilized for traffic control and crowd control. One of them is the video tape person to video tape any warnings or events that we provide and utilize myself.

Q So, what would the total be, then?

A It would be five total.

Q Five total. Have there been any arrest on any Saturday, any date since January twenty-third, since these demonstrations have begun, have there been any arrests at Aware Woman?

A No official arrests.

Q No official arrests. You mentioned some people were arrested and later released –

A No.

Q – due to probable cause, I believe was your statement.

THE COURT: He did not say that.

MR. CADLE: I thought that was his statement.

THE COURT: He didn't say anything about probable cause.

MR. CADLE: I apologize, Your Honor. I thought that was his testimony.

Q These officers, these five officers on an average Saturday, is Saturday the typical demonstration day? Is that the day of concern?

[p. 181] A Uh-huh.

MR. WEISS: Excuse me, Your Honor, I need to interpose, he need to answer verbally. We all know he is saying yes or no.

THE COURT: He nodded yes. If you would verbalize your response.

THE WITNESS: Yes.

Q Do these officers respond to a call from Aware Woman or are these fifty officers on January twenty-third, did they respond to a call from Aware Woman a crime has been committed and the officers respond or what brings them to that site?

A We respond there basically for the requirements of any police agency towards a community and that is to provide safety. And, in the demonstrations that we have there on Saturday, there's anywere [sic] from two hundred to four hundred fifty people. And, officers are required there for crowd control.

Q So, the officers go out in advance of any activity, set up baricades [sic] or man their positions. They're not called out because of a crime in progress or any crime has been committed?

THE COURT: Did you say two to four hundred?

THE WITNESS: Two to four hundred people, yes.

Q Captain Allgeyer, are you familiar, there are three organizations named on this court order. Are you familiar [p. 182] with the differences between Operation Rescue, Operation Rescue America, and Operation Goliath? Do you have any first hand, factual knowledge of whether those organizations even actually exist or whether those are legal entities?

A Not other that what you told me, Mr. Cadle, at a meeting at the police station.

Q Okay. Captain Allgeyer, you mentioned earlier that you have talked with me about people who were blocking ingress or egress. Have you given me a warning relating to me personally blocking ingress or egress at Aware Woman Clinic during this time period?

A I asked you that the people that are there, you have a tendency to control –

Q Have you given me personally a warning related to my personal blocking?

A I don't remember you blocking the roadway.

Q You don't remember me ever blocking the driveway ingress, egress of Aware Woman Clinic?

A No.

Q The specific actions that this motion that we're here today to discuss, Captain Allgeyer, is trying to find me guilty of trespassing on, sitting in, blocking or obstructing ingress into or egress from any facility at which abortions are performed in Brevard and Seminole County, Florida.

Have you seen any of that or heard any of your [p. 183] officers testify to my participation in those activities? Sitting in?

A Not you personally, Mr. Cadle.

Q Not me personally. It also seeks to find us in contempt of court for physically abusing persons entering, leaving, working or using any services at any facility which abortions are performed in Brevard County.

Have you seen me physically abuse anyone entering or leaving Aware Woman Clinic?

A Not you personally, Mr. Cadle.

Q Or attempting or directing others to take these actions? Have you seen me attempt to direct someone to physically abuse someone entering or exiting?

A No, Mr. Cadle.

Q Thank you. You described earlier that there were two to four hundred people on an average Saturday. Is that the number of prolifers? Is that the number of the crowd?

A That would be total number.

Q The total number of the crowd. The first few weeks of these demonstrations, after we had met and we had discussed various crowd control situations and we met again, I believe, with the chief of police.

The first several weeks, is it true that the baricade [sic] situation changed? That crowd control techniques changed? That some Saturdays the baricades [sic] were in the middle [p. 184] of the street forcing people into the street, sometimes the baricades [sic] were up on the property line, other times they were somewhere in between with a buffer zone? Is it true that they varied each week for the first several weeks?

A Yes, sir. Basically because we did not know the size of the crowd we would face nor the tactics that would be provided because we knew each week in the impact training different tactics were taught.

Q Is it true that the police action of baricades [sic] actually forced people to stand in the public street at certain times during these demonstrations?

A Mr. Cadle, with the size of the crowd –

Q I'm just asking is that true?

A With the size of the crowd, yes.

Q So, someone standing in the street could have been doing so by direct police action by police baricades

[sic] that would have directed them to stand in the street? Is that accurate?

A There is not much room in that area, yes.

Q You mentioned a press area. Was that press area on the public right-of-way that you were describing?

A Yes, sir.

Q Was it labeled as a press area?

A It was baricaded [sic] with police line tape.

Q Did it say "press", anything about the press on this [p. 185] area? Just a public right-of-way area that was blocked off. Were there press inside of that area or did the press ever request a baricaded [sic] area for them to stand in?

A The press normally when they respond to a location like that, we try to have an area available for them.

Q Did the press ever request that or were there press inside of this particular area, this specific area?

A There had been.

Q There were press inside of that area?

A What time period are we talking about?

Q Has there been more than one day in which you established a press area?

A Yes, sir.

Q And, that press area was established because the press asked for that area or they – no one asked for that area?

A Sir, through experience in law enforcement, when you have a situation like that, you either provide an area for the press or they find an area. So, it's better to be prepared.

Q The neutral zone you described, this buffer zone trying to separate these two sides. The proabortion side would be toward the building and the prolife side would be on the outside. Was that area at the property line or was that buffer area out on the public area?

A That area was out on the public right-of-way.

[p. 186] Q So, there was public right-of-way area in which prolifers were not allowed? Is that accurate?

A You mean with the buffer area?

Q Yes. Was there public right-of-way along there in which prolife individuals were not allowed to stand?

A There was an area were nobody was allowed to stand but Melbourne Police officers.

Q Okay. When this buffer zone has existed, has there been a statement or announcement to the proabortion crowd that they're not allowed to come around on to the public right-of-way or street area or were they allowed to come in that direction if they're out –

A At that time there was none given.

Q Never been an announcement to them?

A I did tell them on several occasions, including Ruth Aric (phonetic) to please stay on the clinic side of the property. But, there was nobody arrested. They were asked to stay on that side of the barrier.

Q And, have you ever observed me step across this painted line that's supposed to be the property line?

Have I ever been charged in your presence with ever, ever trespassing on this property?

A Ever?

Q To your knowledge?

A I can't recall if you have ever been charged in [p. 187] previous rescues at the clinic. But, not since January eighteenth, now.

Q Have you had reason to see vehicles pulling into the Aware Woman parking lot without license plates on their cars?

A Yes, sir.

Q Is that legal or illegal in the State of Florida?

A It is illegal.

Q Has there been any police action? Have those people been ticketed as they drive into the parking lot without a license plate?

A It is the policy to warn those people, varify [sic] they do have a tag that accessible in the vehicle and we ask them at the earliest convenience when they leave the clinic to please put the license plate on.

We provide them with the same courtesy we provide your sidewalk counselors that obstruct traffic. We provide warnings.

Q And, how many vehicles would you say you've personally seen driving into that parking lot without a license plate?

A I would say approximately five or six.

Q Approximately five or six. How many of those people have you warned or directed another officer to warn that they had to put the license plate on?

A Five. One was written a citation because of an [p. 188] attitude problem.

Q Because of an attitude problem. Have you ever seen any people associated with Aware Woman, whether they're an employee or volunteers and you've said there were two to four hundred people involved on both sides. Have you ever seen them in the driveway? Have you ever seen anyone related to Aware Woman calling themselves prochoice stand in the driveway?

A Yeah.

Q Have you ever seen them line up across the driveway?

A Yes, sir.

Q Has the Melbourne Police Department during these demonstrations ever chosen to block or close this street Dixie Way?

A Yes, sir.

Q And, they would do that by a line saying the street was closed?

A Signs and baricades [sic], yes.

Q Bringing your attention to this general property, we see the median listed on out on U.S. One. Are individuals allowed to stand out on the median on U. S. One in front of Aware Woman?

A We have not allowed them to stand out there, no.

Q Are individuals in the City of Melbourne allowed to stand out in other medians strips in front of other businesses [p. 189] for the purpose of soliciting donations?

A Yes, sir. But, it is a violation of law to have signs in their hands.

Q To have signs in their hands. So, if they were to say "Fundraiser for Leukemia" and standing in the median in the City of Melbourne, that would be a violation of law?

A I've never seen that type of sign before. I review all permits for that type of activity. And, several times I have put down on those permits request adult supervision must be present and traffic – they must not obstruct traffic at any time.

Q Captain Allgeyer, I read to you earlier the charges from this motion related to trespassing, sitting in, blocking ingress or egress, physically abusing individuals. The plaintiffs would desire to find me guilty.

In your professional opinion as an expert police officer, you've stated that you have not seen me do any of those activities. Do you believe that in any way I'm guilty of those activities?

A Not directly, no.

MR. CADLE: Thank you. No further questions.

REDIRECT-EXAMINATION

BY MR. D'ALEMBERTE:

Q Captain Allgeyer, you indicated in the beginning of [p. 190] your cross-examination that the Melbourne Police Department was competent to handle the job. Would enforcement of the injunction against organizations conducting these obstructions to egress and ingress hamper your job in any way at all?

If the court were to enforce the injunction against organizations that were hendering [sic] egress and ingress into the facilities, would that hamper your job at all?

A No.

Q Would it help your job?

A Yes, sir.

Q All right. Now, as you've mentioned a moment ago, apparently quite a lot of camera equipment is out there on the scene?

A Yes, sir.

Q For what purpose do the police bring a camera to the scene?

A Basically we wanted to video tape any warnings that the officers may give to anybody that may obstruct traffic or even record a warning on a trespass of the property.

The second reason is to protect the officers to record their contact where there may not be – if there's a citizen complaint filed and an internal investigation or

even a civil rights violation that we have that documented on tape.

Q Do you have any reason to think that civil rights violations would be filed against the officers of the [p. 191] Melbourne Police who are working at this scene?

A Yes, sir.

Q And, what is that reason?

A Well, basically because of the meeting I had with Mr. Cadle discussing –

MR WEISS: Your Honor, I'll object. This is extremely hypothetical and calls for –

MR. D'ALEMBERTE: It's not hypothetical. He said he had a meeting with Mr. Cadle.

MR. WEISS: If a civil rights action is taken, that's not subject to a violation of this court's order and sanctions. It's irrelevant and immaterial that these people may at some future time file civil rights actions.

MR. D'ALEMBERTE: Your Honor, it's exactly the idea that Mr. Cadle and the people who are defendants in this case, not all of them, are trying to do their best to get the Melbourne Police Department to back off their job by threatening them with civil rights violations.

That's the reason for the court – the Captain's already said it would be helpful to the police department to have the injunction enforced. But, he's now also said that Cadle has made some suggestions about the filing of civil rights against the police officers, so much so that they send one of four officers out there as a camera man

for the purpose of protecting – in part [p. 192] protecting them from that. That's my very point.

MR. WEISS: Your Honor, it's irrelevant, immaterial. It's a subject of another lawsuit, if it's ever filed. It certainly wouldn't constitute a violation of your sanctions. We all have a right to redress the court for grievances. If one is filed, that is the subject of a different dispute.

MR. D'ALEMBERTE: If it is, now we're dealing with the threat of one. That's the only question, Your Honor.

THE COURT: If the threat was made, it wouldn't – well, it would tend to support the allegation of a violation of the injunction because, the question is whether or not those individuals subject to the court's injunction have engaged in activities in violation of the injunction. I'll permit it.

Q Do you remember the question, Captain?

A Could you repeat it?

Q The question was, we were talking cameras, you remember. And, you indicated that there were five officers, including yourself and one of them has a camera. You indicated one of the reasons they have a camera is to protect the officers from illegitimate claims; is that correct?

A Yes.

Q All right. Now, does your fear of illegitimate claims come from a conversation with Mr. Cadle?

[p. 193] A Yes, sir.

Q And, what did Mr. Cadle tell you?

A Mr. Cadle basically told me that some of the impact training would be to go to the courthouse and learn how to file lawsuits and also instruction on civil rights violations.

Q All right. And, what did you understand this conversation to mean?

A It means basically that the police department was going to be watched very closely by Mr. Cadle and the impact team and Operation Rescue. And, also any action by people at the clinic could result in a lawsuit also.

Q Now, Captain Allgeyer, in your studies of police work, have you had some training also in the law of constitutional rights? Of citizens' rights to free speech and communication?

A Yes, sir.

Q Now, let me ask you, if I may approach the chart, Your Honor, this area along U. S. One, is there an area there in which people can hold up signs and communicate their sentiments on the issue?

MR. CADLE: Your Honor, I would like to object. I believe this line of questioning is related to the second motions which was filed which the court is not hearing today. It has absolutely nothing to do with whether myself and any of the named defendants have broken this [p. 194] injunction we're being charged with today.

MR. D'ALEMBERTE: My understanding, there was a conversation about the median strip. Somehow, as I understood from Mr. Cadle, some suggestion that somehow there was a limitation by the police department in getting communication out. I'm just trying to make it clear the police department is not acting that way.

There is plenty of ways to communicate if all they are trying to do is communicate. They're trying to intimidate and trying to really stop ingress and egress. They may not want to go to a different location, but communication is available there.

It was Mr. Cadle that raised the median strip. I just want it clear in the court's mind there is no problem there.

THE COURT: You were referring to the westerly right-of-way.

MR. D'ALEMBERTE: Easterly, right.

THE COURT: Rather than on the unpaved portion of U. S. One?

THE WITNESS: Yes, sir.

MR. D'ALEMBERTE: I'm sorry. It's the easterly. I'm right now. I had it turned around earlier, but I think you've got me straightened out. I think it's on the easterly side of U. S. One.

[p. 195] THE COURT: No.

MR. D'ALEMBERTE: Eastern to the property line, Your Honor, but west of U. S. One. You are correct. I apologize. I don't know how I'm going to find my way home, Your Honor.

MS. PATRICK: Your Honor, left and right always work for me.

MR. D'ALEMBERTE: I'm sorry, Your Honor.

THE COURT: It is as much to answer Mr. Cadle's objection that the right to demonstrate, the right to peacefully protest is preserved. I think there is confusion. I think it's germane as to what is available or that there would be no blocking of the entrances to the clinic. You may inquire. Overuled.

MR. D'ALEMBERTE: Thank you, Your Honor.

Q And, then if I may go now south on U. S. One also, this area, along U. S. One, again the western side of U. S. One is available for protesters?

A That's correct.

Q Now, is it true you cannot reach the clinic without coming off U. S. One somewhere on this horseshoe?

A Yes, sir.

Q If I describe, Dixie Lane – Dixie Way goes and then turns south; is it?

A Yes, sir.

[p. 196] Q And, then back to –

A Old Colonial.

Q It's Old Colonial Way that comes back – So, a car entering would have to come off from U. S. One.

A Yes, sir.

Q So, in terms of communicating, for the purpose of communication, if you're on U. S. One, you can communicate?

A That's correct.

Q And, be seen and heard?

A Yes, sir.

Q Okay. Now, there is some question about the practice of placing baricades [sic]. As I understood the suggestion being made by opposing counsel on cross-examination, it was some how the baricades [sic] forced people into the street. Did I understand that correctly? Do the baricades [sic] force people into the street?

A That's the question that was asked. But, what the baricades [sic] do is provide reasonable accommodation for the people that are protesting, provide them a safe haven to be able to protest.

Q Now, in looking at the –

THE COURT: Now, to the extent that they, if I understood the question correctly, when the numbers exceed the area available, they go to the street?

THE WITNESS: Bascially [sic] what we did, Your Honor, is [p. 197] we put baricades [sic] up dividing the street in half, taking the southern portion of the street and blocking that off and making Dixie Way a one-way street in front of the clinic which would be westbound.

This provided a reasonable accommodation for the protesters. They could be heard, plus it provides safe ingress and egress into the clinic. And, I imagine, I understand that's where that they were forced into the road.

The people, the prolife people did not like that because the Melbourne Police Department didn't let them utilize all the public right-of-way which they felt they were due.

And, there was fliers passed around, articles in the newspaper that we were making up our own rules. And, the chief of police made a decision at that time to give them all the right-of-way they wanted.

Q That meant they were in the street?

A Then they were in the street, but crossing from the vacant lot where they parked over to this right-of-way on the north side of the road. Children and adults both going back and forth constantly to their cars to eat and back over. And, it was really tying up this road. And, the baricades [sic] in the middle prevented that from happening.

THE COURT: How was traffic wanting to go east on [p. 198] Dixie Way accommodated under that arrangement?

THE WITNESS: We had signs and Dixie Way became a two-way road west of the clinic. What this basically provided was ingress and egress in a westerly direction from the parking lot of the clinic.

THE COURT: For the length of the clinic property it was one way going west?

THE WITNESS: That's correct.

THE COURT: All right.

Q Now, when the baricades [sic] were put in the middle of the street, it was possible, was it not, that

people could stand back there and they don't have to enter the street?

A That's correct.

Q Now, there was some reference on cross-examination to license plates. Do you understand why patients of the clinic would come to the clinic without their license plates?

A Yes, sir.

Q Why?

A Apparently there is someone in the organization that has a link to the Division of Motor Vehicles in Tallahassee. And, they would run registration checks and mail those people correspondence.

MR. WEISS: Your Honor, I would have a problem with that unless he knows of his personal knowledge who did this activity, exactly, you know, who are the involved [p. 199] persons. I want to make sure these activities are attributable in any way to my clients.

MR. D'ALEMBERTE: I think, counsel, upon your representation that your clients have not been involved, I would accept that representation.

MR. WEISS: I would accept that, Your Honor.

Q Continue, Captain.

A And, they would send them correpsondence [sic].

MR. CADLE: Your Honor, when we come to that point, I would like to raise a concern I'm being named in this activity. We're hearing some people mail some things to some other people.

MR. D'ALEMBERTE: I don't think your name has been mentioned, Mr. Cadle.

MR. WEISS: I would like to clarify there is a lot of correspondence from Operation Rescue with a Palm Beach address. My knowledge, Mr. Cadle, is Operation Rescue is in Melbourne, Florida, South Brevard County. That would be the only way I could see –

MR. D'ALEMBERTE: I don't think Mr. Cadle has been named, Your Honor.

MR. CADLE: Not directly.

MR. D'ALEMBERTE: I'm just asking because a question came up about license plates. It might explain why people would want to remove their license plate. I'm [p. 200] asking for a clarification why a driver would drive without a license plate.

Q And, your answer is what, Captain?

A That their license plate number is written down, run through a Compuserve program, find out the registration for the vehicle, and they receive correspondence from either Operation Goliath and Operation Rescue.

(Whereupon, a short recess was held, after which the following proceedings were had:)

THE COURT: Well, all right. Let's finish with this and anticipate the next witness tomorrow.

BY MR. D'ALEMBERTE:

Q Now, at the conclusion of the cross-examination, Mr. Cadle went through the court's order and asked if you had seen certain activities by Mr. Cadle. Now, let me

ask you whether, in your dealings with the impact demonstrations, Mr. Cadle has appeared as a leader of the impact demonstrations?

A Yes, sir.

Q And, in what way has he appeared as a leader of those demonstrations?

A He's the main representative from the meetings that we originally had. Mr. Cadle had knowledge of it. Mr. Cadle has even requested a City Occupational license to open up a business across the street from the Tabernacle Church basically to sell certain Operation Rescue items and Operation [p. 201] Goliath items to help pay for impact training.

Q Has Mr. Cadle come to you at any time wanting to coordinate with the police department relating to these impact demonstrations?

A No. He hasn't come to us. We had to go to him.

Q All right. When you went to him, did he respond as a leader of the impact demonstration?

A From my recollection, I believe Mr. Cadle told me that he was in charge of Operation Goliath and training coordinator for the southern regional director for Operation Rescue.

Q All right. When demonstrations have taken place, have you seen Mr. Cadle, even though you have not been close enough to hear him, have you seen him in the middle of a group of people who were demonstrators?

A Yes, sir.

Q At that time what did he appear to be doing?

A There were times when he was walking in a large group of people. And, also times when he was praying with a large group of people.

Q Okay. Based on your observations, do you have opinion as to whether or not Mr. Cadle is in charge of the impact demonstrators?

A It was my understanding that he was. That was from the meeting with him.

[p. 202] MR. D'ALEMBERTE: Okay. Thank you. That's all, Your Honor.

MR. WEISS: Just briefly, Your Honor.

RECROSS-EXAMINATION

BY MR. WEISS:

Q Not once since the entry of this court order in September of 1992, have you ever seen Ed Martin, Judy Madsen, or Shirley Hobbs, not the Shirley in the back, have you seen them in front of the clinic?

A Which people are you referring to?

Q This fellow right here with the scruffy beard, this lovely lady right here, and other than this Shirley, you don't know who Shirley Hobbs is.

A I don't recall.

Q This is some lady Shirley you know.

A I have never known Shirley's last name. I thought you were referring to that lady.

Q You haven't seen Ed or Shirley Hobbs, other than this Shirley who isn't Shirley Hobbs, in the area of the clinic?

A This lady in the blue looks very familiar.

Q Have you ever seen her?

A I cannot say for sure, no.

MR. WEISS: Nothing further.

[p. 203] THE COURT: Mr. Cadle?

MR. CADLE: Your Honor, very briefly.

RECROSS-EXAMINATION

BY MR. CADLE:

Q You just stated, I believe, Captain Allgeyer, the Melbourne Police always had to come to me to talk. Are you aware of a particular Saturday in front of Aware Woman were some people were originally arrested or taken into custody and later unarrested or released from that custody, in which I approached Captain Keith Chandler, of the Melbourne Police Department, and asked him if we could have a meeting so this type of activity did not continue. Do you recall that?

A I remember a discussion between you and Chief Chandler.

Q Did a formal meeting follow?

A As I recall a formal meeting, I recall Chief Chandler stating in a mutual conversation with you, that the two of us or three of us should get together and try to iron out some things.

MR. CADLE: Your Honor, may I approach the map for one brief second. I believe this diagram has become as clear as mud for us.

Q In many instances, there has been much discussion, I had made a statement earlier about people being forced into [p. 204] the street. I believe you said at one point baricades [sic] were down the middle of the street. When those baricades [sic] were down the middle of the street, were the prolifers on this side of the street?

THE COURT: So the record is clear, would you take a pointer and point to it.

Q On the north side of Aware Woman, were the prolifers allowed on this side of the street or this public property or sidewalk on any of the public right-of-way on that side when the baricades [sic] were down the street for the prolifers standing on the opposite side?

A The roadway was to be left open and nobody was allowed in the roadway. It was for vehicle traffic. And, then the public right-of-way to the north side of the road was open for prochoice people.

Q Prochoice or prolife? Prolife were not allowed anywhere on the public right-of-way in front of Aware Woman Clinic on this particular day; is that accurate?

A No.

Q It is not accurate?

A No.

Q Were prolifers – when the baricades [sic] were down the middle of the road, were prolifers being allowed on the public right-of-way?

A Prolifers?

[p. 205] Q Prolifers. Was I allowed on the right-of-way directly in front of Aware Woman, the sidewalk, the public right-of-way when the baricades [sic] were down the middle of the street?

A No.

Q Prolifers were denied that?

A That was done for public safety and crowd control.

Q Have there been any instances where you had reason to see prolife individuals trying to hand out literature on U. S. One anywhere in the vicinity of Aware Woman?

A Yes.

Q Would that be possible to hand out literature on U. S. One?

A It would be deadly.

Q It would be deadly to hand out literature on U. S. One approaching Aware Woman on Highway U. S. One.

A The problem we run into, Mr. Cadle, handing out literature to a moving motor vehicle is a violation of state law.

Q Okay.

A You would be obstructing traffic –

Q Is there any other alternative?

MR. D'ALEMBERTE: If he can finish his answer, Your Honor.

A – whether it would be on Dixie Way or U. S. One. [p. 206] It's a violation of the law. I have warned you and several people at the protests on Saturdays of that fact.

Q And, Captain, in a meeting with yourself, myself, and the chief of police Keith Chandler, did he say that the fact citations had been written on a previous Saturday would no longer be written related to a memorandum that blocking ingress or egress would be standing in front of a vehicle that citation that had been written, even though he wouldn't tear them up, he would not write a citation for that.

A I don't think that's the way it went. If he attempted to hand a pamphlet to a moving motor vehicle, if someone went up to the vehicle and tapped on the window and attempted to pass the pamphlet into the window and the vehicle has to slow down or make an evasive maneuver to avoid that person or if a person stood in front of a vehicle, it would be obstruction of traffic.

Q If a vehicle is on Dixie Way and there is no other traffic, no one standing in front of this vehicle forcing it to stop, that's not blocking the egress and someone is there to hand out literature and the vehicle voluntarily stops and desires to accept it –

A It has to voluntarily stop.

Q – voluntarily stops and decides to accept it, and someone hands that vehicle literature, that's not obstructing traffic?

[p. 207] A Uh-huh.

MR. WEISS: You need to indicate that audibly yes or no.

THE WITNESS: Yes.

MR. WEISS: I couldn't hear him and I wanted to make sure the record reflected is [sic] answer.

REDIRECT-EXAMINATION

BY MR. D'ALEMBERTE:

Q Captain, from what you observed, is it your impression, is it your impression seeking ingress and egress from Aware Woman are voluntarily stopping to get literature?

A Sir, I've been there since impact training started on January eighteenth, I have seen approximately two people – two vehicles stop and actually be intimidated by stopping and rolling the window down to see what that person needed.

Q The other vehicles have proceeded?

A Pardon?

Q The other vehicles have proceeded on?

A Yes, sir.

Q Was it your impression of the two vehicles that you assumed stopped or they stopped because of people coming up to the car, coming very close to the car?

A Yes, sir.

MR. WEISS: Objection, Your Honor. That calls for [p. 208] mind reading.

THE COURT: Sustained.

MR. D'ALEMBERTE: Thank you.

MR. WEISS: Just one last question.

RECROSS-EXAMINATION

BY MR. WEISS:

Q You are not worried about Mr. Cadle, Ed Martin, and Judy Madsen taking a civil rights action against you because if you comply with all laws, you wouldn't do anything to violate their civil rights you wouldn't have to worry about them possibly suing you.

A That's not correct.

Q You are worried about it?

A I am worried about them suing me even though I do my job correctly.

Q If they brought suit against you and you haven't taken any steps to violate their rights, you've got nothing to worry about. You don't lie awake nights worrying about it?

A No. I don't stay awake. But, I do worry about the other officers who work for me, yes.

Q But, nobody has filed any seeking any civil rights violations against the Melbourne authorities from the beginning of the world to the date of these present demonstrations?

[p. 209] A Civil rights violations?

Q Yes.

A Beginning of the world?

Q From the beginning of October, September 30, 1992, beginning of this lawsuit?

A No.

MR. WEISS: Okay. Nothing further.

THE COURT: Mr. D'Alemberte?

MR. D'ALEMBERTE: No, Your Honor.

THE COURT: All right. May this witness be released?

MR. D'ALEMBERTE: Yes, sir.

THE COURT: Officer, thank you. The court will excuse you from further attendance.

I believe you indicated the next witness is one of an hour or so; is that correct?

MR. D'ALEMBERTE: I think so, Your Honor. We do have another witness, but I don't believe it would be much shorter.

THE COURT: We'll resume at 9:30 tomorrow morning.

(Whereupon, the foregoing proceedings were recessed at 5:50 o'clock p. m.)

CERTIFICATE OF REPORTER

STATE OF FLORIDA :
: ss:
COUNTY OF ORANGE :

I, Margie L. Breit, Notary Public for the State of Florida at Large, do hereby certify that the foregoing proceedings were reduced to shorthand in the presence of the within-named parties and later transcribed; that the foregoing is a true and correct transcription of the excerpt of the proceedings as aforesaid.

I do further certify that this hearing was taken at the time and place in the foregoing caption specified and was completed without adjournment.

I do further certify that I am not a relative, counsel, or attorney for either party or otherwise interested in the event of this action.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my seal of office on March 28, 1993, in Orlando, Florida.

/s/ Margie L. Breit
MARGIE L. BREIT

My Commission Expires:
October 7, 1994
Commission No: CC 05317

No. 93-880

In The

Supreme Court of the United States

October Term, 1993

JUDY MADSEN, ED MARTIN, and SHIRLEY HOBBS,

Petitioners,

v.

WOMEN'S HEALTH CENTER, INC., AWARE WOMAN CENTER FOR CHOICE, INC., EPOC CLINIC, INC., AND CENTRAL FLORIDA WOMEN'S HEALTH ORGANIZATION, INC.,

Respondents.

On Writ Of Certiorari To The Supreme Court Of Florida

JOINT APPENDIX
VOLUME II
PAGES 319-626

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** Petitioners objected to the inclusion of this testimony en masse in the Joint Appendix because it was transcribed after the granting of the Petition for Writ of Certiorari and was not before the Supreme Court of Florida.

The following opinions, judgments, and orders have been omitted in printing this Joint Appendix because they appear in the appendix to the Petitioner's Petition for Writ of Certiorari:

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IN THE CIRCUIT COURT OF
THE EIGHTEENTH JUDICIAL
CIRCUIT IN AND FOR SEMINOLE COUNTY, FLORIDA

WOMEN'S HEALTH CENTER, INC., AWARE WOMAN CENTER FOR CHOICE, INC., EPOC CLINIC, INC., AND CENTRAL FLORIDA WOMEN'S HEALTH ORGANIZATION, INC.,	]	
Petitioners,	]	CASE NO.
vs.	]	91-2811-CA
OPERATION RESCUE, OPERATION RESCUE AMERICA, OPERATION GOLIATH, ED MARTIN, BRUCE CADLE, PAT MAHONEY, RANDALL TERRY, JUDY MADSEN, AND SHIRLEY HOBBS,	]	
Respondents.	]	

BEFORE THE HONORABLE
ROBERT B. MCGREGOR
JUDGE OF THE COURT

A hearing in the above style cause was held at 1:30 o'clock p. m., on Tuesday, the 23rd day of March, 1993, in the Courtroom of the Seminole County Courthhouse [sic], Sanford, Florida, before Margie L. Breit, Notary Public for the State of Florida at Large.

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[p. 213] WHEREUPON:

The following proceedings were had:

BRUCE CADLE

a witness herein, having first been duly sworn, was examined and testified as follows:

DIRECT-EXAMINATION

BY MR. D'ALEMBERTE:

Q Mr. Cadle, would you please identify yourself, your name and address and occupation.

A My name is Bruce Allen Cadle. I reside at 701 Andrew Street Southeast, Palm Bay, Florida. I'm a full time missionary to the preborn children.

Q All right. Could you tell us the names of organizations you belong to, of all the organizations that you belong to.

A I belong to the Florida Association of Realtors, the National Association of Relators. And, I believe that's all.

Q Okay. Do you belong to an organziation [sic] named Operation Goliath?

A No, sir.

Q Have you at some time belonged to such an organization?

A No, sir.

[p. 214] Q You've never belonged to Operation Goliath?

A You said to an organization called Operation Goliath. The answer would be no, sir.

Q Your answer is no?

A Yes, sir.

Q Is there such an organization as Operation Goliath?

A Not to my knowledge.

Q What is Operation Goliath?

A Operation Goliath, to my knowledge, was a prolife campaign, I believe, or philosophy.

Q Okay. And, who organized this campaign?

A There were a group of prolife organizations, Right to Life of South Brevard, Brevard Life League, Life Chain, a group of individuals as well coming together under a similar belief.

Q All right, sir. Who were the individuals who came together?

A I have no list, sir. There have been –

Q I'm sorry.

A I have no list of individuals.

Q I understand you don't have a list.

A There maybe hundreds.

Q Just to the best of your memory, who are the people that came together?

A I would certainly have agreed and was involved in [p. 215] that campaign. There would be – I'm not sure how to answer this, Your Honor, except who has come together.

Q Well, I'm trying to use your term in asking the question, Mr. Cadle. There was a, you said a Compaign [sic] called Operation Goliath.

A Correct.

Q And, there were people who were involved in that campaign.

A Correct.

Q And, that campaign was involved in Central Florida; was it not?

A Correct.

Q And, particularly directed towards the clinics, the Women's Health Clinics in Seminole and Brevard County?

A Brevard County only.

Q And, what was the duration of this campaign under the name of Operation Goliath?

A That name probably began in the fall of 1990, as best I recall. To my knowledge, it has not been used since the fall of 1992.

Q All right, sir. But, it was still in use then for approximately a year after the preliminary injunction was entered in this cause?

A That name may have been used or existed, yes, sir.

Q I ask you who else did you deal with in connection [p. 216] with – cooperate with in a campaign known as Operation Goliath?

A It would be a variety of individuals that may say, I mean that I'm involved with and interact with on an ongoing basis. There were no officers. This was not an organization, a legal entity, there was not a –

Q I understand that.

A – I'm not sure how to respond to your question.

Q In the activity known as Operation Goliath, who was involved? The names of people involved.

A I am not sure who would claim that they were involved. In other words, if I were standing on a sidewalk in front of Aware Woman Clinic, I'm not sure whose standing beside me would say that they were there involved in a campaign under the title of Operation Goliath, who would say they were there as individuals.

If it was a list of everyone that's ever been connected with me at a prolife event in Central Florida that would range into the hundreds or thousands, many of which I'm not even personally familiar with.

Q All right, sir. I'm actually trying to use your testimony and trying to get the details about the people that came together to form the campaign called Operation Goliath. Who came together? What individuals? You do know some names certainly, Mr. Cadle.

[p. 217] A Oh there are certainly people on an ongoing basis –

Q Let us have those names.

A – who were active in prolife activity, if that's what you're seeking, in the Melbourne area.

Q Well, I probably will want that at some point. But, I would like to have it specific as to Operation Goliath. Other people, as you told us earlier, came together for Operation Goliath.

A All right, sir. I have no list of names.

Q I'm not asking for a list. I'm asking you for your memory.

A Either printed or in my memory, a list of names of people who would have come together under the name of Operation Goliath. That would be to say that we came together at the beach, a group of individuals, some maybe known by me, some not maybe known by me as to the people that maybe on the beach on a Sunday afternoon.

Q All right, sir. And, the people that came together, where ever they came together under the name of Operation Goliath, what are there names?

THE WITNESS: Your Honor, I'm not trying to avoid this question.

THE COURT: Well, you are. You're dancing all around it. Hell, obviously you have knowledge of some of them. If you are fencing with him, I ask you not to do [p. 218] that. I ask you to answer the man's question.

A In specifically, what names are you requesting?

Q I'm just asking, I'm trying to use your terms –

THE COURT: Never mind. Answer the question, sir.

THE WITNESS: All right, sir.

A People, that in trying to answer your question, people that may have come together under the name of Operation Goliath, I can think of an individual named Kent Smith, and individual named Mary Ellen Smith, individuals Alex Troisi.

Q Could you spell that for me, sir.

A I'm not sure of the spelling. I believe it's T-r-o-i-s-i.

Q All right, sir.

A Individual Jennifer Troisi, individual John Racine (phonetic), individual Lynn Racine. I'm not sure how far to go here. Again, I could describe names of individuals that I have seen at a prolife rally. I'm not sure how many –

Q Let's just make sure, the name Operation Goliath was coined by whom? Who came up with that name?

A I believe originally it was based out of Dobbs Ferry, New York. That's were I first heard the term.

Q All right, sir. And, you are the first person to use that term in Florida so far as you know?

A So far as I know.

Q All right, sir. And, so Operation Goliath was a [p. 219] camaign [sic] which began and provided leadership for?

A I was involved with some of those individual mentioned in bringing this campaign.

Q Yes, sir. And, you were the person who initiated the campaign under that name and you were one of the leaders of the campaign known as Operation Goliath?

A I was regarded and titled at some time or another as director of the campaign.

Q All right, sir. And, were there any other people who carried titles of that campaign other than you?

A No.

Q All right, sir. Now, the slogan, did Operation Goliath have a slogan?

A Well, the basis for the title comes from scripture from the Bible referring to Goliath being the giant, David being the teenager at the time and the fact that David was able to bring down the giant, and as we refer to the abortion industry as a giant.

Q Was there ever any reference in the Florida Operation Goliath literature to Operation Goliath being the meanest and best armed of all the anti-abortion organizations?

A I don't have specific recollection of that.

Q Do you recall using the term "best armed" at any point?

A I don't recall that.

[p. 220] Q All right, sir.

A I'm not denying it, but I don't recall it.

Q I'm sorry. I had a piece on it. I can't find it. I'll return to that in a moment.

Now, Operation Goliath did put out literature referring to Operation Goliath; is that right?

A Yes. There was literature with that title.

Q And, that was done in the period of fall, 1990 to fall 1992?

A To the best of my recollection.

Q Do you recall any literature being distributed after that time?

A Not to my recollection.

Q Okay. Now, what was the purpose of Operation Goliath?

A The purpose of Operation Goliath was to bring an end to abortions in America.

Q All right, sir. How was that to be done?

A That was to be done through exposing the abortion industry.

Q And, how was that to be done?

A That was to be done by providing information about the abortion industry, by providing alternatives to those seeking abortions, to providing assistance to those seeking abortions.

[p. 221] Q Okay. Let me go into each of those. How were you bringing information about abortions?

A Information about abortions as far as the Melbourne area is concerned is typically provided through sidewalk counselors that stand out on the sidewalk areas in front of Aware Woman.

Q Okay. Was it a part of the process of Operation Goliath to try to find out the names of physicians and staff people associated with a clinic and to send out literature concerning those people?

MR. WEISS: Your Honor, I'm just going to have to interpose and objection with regard to time frame here. We're here on sanctions. Is this pre-order, post-order?

MR. D'ALEMBERTE: It's any time in the period of fall 1990 to the fall of 1992 when he said it existed. That would be overlapping the time of the injunctive order entered in the fall of 1991.

MR. WEISS: The only purpose of the objection is we need to know when these activities took place. To be held in contempt, it would have to be post your injunction.

THE COURT: I gather you will tie it in.

MR. D'ALEMBERTE: I thinks that's correct, Your Honor. I'm having a little bit of difficulty finding out even the basic data. And, I'm struggling through. And, [p. 222] I'll try to get to that point. It's obviously the point I want to reach.

Q I need to know if literature was sent out?

THE COURT: Your response, please.

A Could you repeat the question, please.

Q I wanted to know whether in the period that Operation Goliath existed as a campaign, it sent out literature?

A As an official organization, the only literature that I'm aware of may have been a newsletter. I'm not aware of personally sending out any literature relating to the –

Q All right, sir.

A – doctors and things that you asked.

Q May I ask you if you recognize the phone number area code 407-723-4094?

A It sounds familiar. I'm not –

Q All right, sir. You don't know whose number that would be?

A (Shakes head)

Q Now, let me show you Plaintiffs' Exhibit BB, Bravo, Bravo, Your Honor, for identification and ask you if you recognize that piece of literature.

MR. WEISS: Can we establish a time frame, Your Honor, we're being held in contempt of court.

MR. D'ALEMBERTE: In so far as I know, Your Honor –

[p. 223] A I believe this a flier that was copied from the group in Dobbs Ferry, New York that I previously mentioned and was used prior to the formation as in introducing the next phase of the prolife movement.

So, I believe that this would have been published in the fall of 1990.

Q And, published in Florida?

A I would believe that to be true. I didn't publish it so I'm not positive. I would assume that's true.

Q But, it has a 407 area code there.

A Yes, it does.

Q And, you were the director of Operation Goliath in Florida?

A I was titled a director of that campaign.

Q All right, sir. And, would you look at the top of that now and see if there is some reference to Operation Goliath being the meanest, best armed organization?

A Yes. Your Honor, may I question since this was dated by my testimony as the fall of 1990, if this is relevant?

MR. D'ALEMBERTE: Your Honor, I don't think it goes to any violation of the injunction. It goes to the idea that during this period of Operation Goliath was stying itself as a mean, well armored organization that engaged in certain activities, the details of which I [p. 224] hope to get from this witness.

MR. WEISS: Since we're here –

MR. D'ALEMBERTE: None of this relates to your clients, it's my understanding, Mr. Weiss.

THE COURT: I don't read that as referring to the organization. It refers to Goliath as being the biggest, meanest, most threatening, best armored champion of the Philistines. And, as he indicated, David, which I gather corresponds to his group is taking on Goliath.

MR. D'ALEMBERTE: Honestly, Your Honor, it confused me because the organization was named Goliath and I thought they were claiming to be the meanest, best armored. But, I'll move from that if that's what the witness –

THE COURT: Ask him.

Q Is that – is the Judge's explanation your explanation?

A Yes, it would be. We would refer to ourselves as David, in the biblical scenario of David and Goliath and the abortion industry as Goliath.

Q All right. Now, you've indicated that your purpose in conducting the campaign was to close down abortion clinics; is that correct?

A No, sir. That's not correct.

Q Please tell me what the purpose was.

[p. 225] A Our purpose was to bring an end to abortion in America. We never stated that our desire was to close an abortion clinic, merely to stop the act of abortion.

Q When you say we never stated that, who are you including in the we?

A Any one that I've heard –

Q All right, sir.

A – of the people that were named earlier.

Q As a step along the way to ending abortion in America, do you seek to close down the abortion clinics?

A No, sir. Never.

Q Okay. Did you attempt in any way to slow down the operation of the abortion clinic?

A No, sir. Our acts have been designated specifically against the act of abortion, not against the business.

Q And, did you also in connection with Operation Goliath or with any other organization you've been involved with, and now I ask in the time frame since October of 1991, been involved with directly confronting people who are doctors or staff people in the work of the clinic?

A We have certainly confronted. I'm not sure about directly.

Q Let me go to some specifics, if I may. You've heard testimony, because I think you were in the courtroom, about an incident at the Comfort Inn relating to a witness who [p. 226] testified yesterday. Were you at the Comfort Inn at that time?

A I was not on the property of the Comfort Inn. I was, in fact, the furthest distance away from the Comfort Inn over by McDonalds on the public sidewalk.

Q Were you one of the people that put together that campaign to go to the doctor at the Comfort Inn?

A No, sir.

Q And, what was the leadership of the campaign?

A I honestly don't know. I showed up with a reporter, drove separately and was doing an interview for most

of the morning and held a sign toward the end of the morning.

Q And, you just happened to be at the Comfort Inn at that time.

A No. I heard that there was going to be an activity there related to the IMPACT team.

Q To an IMPACT team?

A Yes, sir.

Q Okay. Now, we're into another term. What is an IMPACT team?

A The IMPACT team, IMPACT stands for the Institute of Mobilized Prophetic Activated Christian Training. There's a twelve week training school currently taking place in Melbourne, Florida.

Q Are you connected with IMPACT?

[p. 227] A As a volunteer, I am assisting with the IMPACT training school.

Q Who organized IMPACT?

A I believe that the organization and origination was with Operation Rescue National.

THE COURT: Operation what, sir?

THE WITNESS: Operation Rescue National.

Q And, who individually was the organizer?

A I believe Keith Tucci is the executive director of Operation Rescue National and this was his original concept.

Q All right, sir. And, are you an officer in Operation Rescue National?

A Not an elected officer. I've been titled as the field director for Operation Rescue National.

Q And, the field director for what region, if you will?

A For the southeastern United States for the United States for Operation Rescue National.

Q And, the IMPACT training program is taking place in your region; is that correct?

A In Melbourne, Florida.

Q And, have you actually taught in the IMPACT training program?

A I have assisted with the teaching. I am not one of the listed teachers.

[p. 228] All right, sir. Now, how often have you taught in that IMPACT training program?

A I'm typically in the classroom for at least a few minutes very day. I believe we are in our tenth week. At sometimes I lead the prayer in the mornings. We usually pray for thirty to forty-five minutes at the beginning of class.

I believe actually teaching that I may have taught for one day, one and a half days back at the beginning of the class.

Q And, what was the subject of your teaching, Mr. Cadle?

A The main topic was library research, being able to use public access information to do research, primarily to find out about malpractice lawsuits.

Q And, have you been present during the course of teaching at the IMPACT training programs on virtually every day?

A I have been in the classroom at least a few minutes virtually every day.

Q Okay. Now, what's –

A I have not presently through the teaching.

Q Okay. Now, who is attending IMPACT training?

A There are twenty-two students.

Q And, what are there names?

A I don't have all their names.

[p. 229] Q Let me have the names you do have.

MR. CADLE: Is this in any way related, Your Honor? This is not a named defendant. I believe this is totally irrelevant.

THE COURT: If it were discovery, it could lead to admissible evidence. I don't know that we're in discovery.

MR. D'ALEMBERTE: Your Honor, we're not, but here's what we're dealing with. We've dealt with Operation Rescue, the national organization, with Operation Rescue now being called Operation Rescue National. Mr. Cadle has indicated that he is the director for the southeast region of Operation Rescue National.

They now have a school. And, the school now trains people, we'll find out in a moment about the nature of that training. And, we've already had testimony that they then stage demonstrations.

We've seen some of the direct evidence. We've also heard testimony about those demonstration. I think we're entitled to know if, indeed, Mr. Cadle, although may be not himself blocking facilities had encouraged other people to do so. It's a clear violation of the injunction, the original injunction and the one entered in September of 1992.

MR. WEISS: That's not the question asked. The [p. 230] question was who are the names of the students.

MR. D'ALEMBERTE: That's right. Because we need to identify those people with the information we've got about the people who have been engaged in this activity.

MR. CADLE: They're not defendants in this action.

MR. D'ALEMBERTE: I understand that.

THE COURT: You raised the issue as if it were that they have some right to privacy. I don't know that there is a right of privacy that pertains under Florida law.

The question is whether its relevant.

MR. WEISS: That's the basis of my objection, Your Honor. Relevancy and materiality. They're holding sanctions against Mr. Cadle. Who attended this school is irrelevant.

THE COURT: Counselor, the injucntion [sic] includes the phrase "directing others." To the extent the injunction contains that, then others become relevant.

MR. WEISS: Judge, if he'd ask the question, did he direct others to trespass, that's a relevant question. The names of the students at this point are irrelevant.

THE COURT: I think he's entitled to know who they are and to, of course, seek information from them. An injunction really is not the end of the case. In other words, it's not yet over. Overrule the objection.

MR. CADLE: Your Honor, may I state for the record, [p. 231] that Operation Rescue National, the organizing group for this training school is not a named defendant nor is the IMPACT team training school.

MR. D'ALEMBERTE: Your Honor –

THE COURT: But, you participate in it, sir, and you are under specific injunctive requirements of this court. And, I think you may – I think it's proper for him to inquire of you as to what your activities are and who is involved and then perhaps talk with others about what that involvement is.

MR. D'ALEMBERTE: Yeah. And, Your Honor, I don't want to leave this question of names. But, I do want to see an exhibit, I think it was in evidence, the letter from Mr. Cadle.

Q Mr. Cadle, this letter marked Plaintiffs' Exhibit Four, which you've signed; is that correct?

A I don't believe it's my personal signature. I believe it was signed on my behalf.

Q But, under your authorization?

A I believe so, yes.

Q All right. That was sent on out on the letterhead of what?

A Operation Rescue National.

Q I'm sorry. Read the words again, if you will.

A Operation Rescue National, subtitled Florida Impact.

[p. 232] MR. D'ALEMBERTE: All right. Now, this was sent out, if I may, Your Honor, offer the Operation Rescue letter.

Q Would you agree that the word "National" is not in that letter?

THE COURT: It will be in evidence as Exhibit Four.

(Whereupon, Plaintiffs' Exhibit Number Four was admitted into evidence.)

Q Would you agree the word "National" is not on that?

A Would I agree?

Q Yeah. There is no reference to Operation National in the title is there? The letterhead?

A Yes, sir. I just read it. It's specifically Operation Rescue National. I believe this – Well, actually on the letterhead, Your Honor, this is a photocopy. The original letterhead would show that the whole background

behind Operation Rescue says National. If you look, that's what I was reading.

Q And, is there any difference between Operaition [sic] Rescue and Operation Rescue National?

A Yes, sir.

Q And, what is the difference?

A My understanding is that Operation Rescue was formed in 1987 by Randall Terry as the founder of Operation Rescue. My understanding is that that organization was defunct as of [p. 233] some two to three years ago. I read that in all the national media.

The federal courts had intervened. Operation Rescue no longer existed. My understanding is that Randall Terry currently refers to himself as the founder of Operation Rescue.

Operation Rescue National, to my understanding, was founded some three years ago by Reverend Keith Tucci based out of Summerville, South Carolina. That is the organization that I am associated with.

Q And, is it your testimony Randall Terry has no contact with Operation Rescue National?

A No, I would not say he has no contact.

Q All right. Now, the pending question was if you will now give us the name of the people who are enrolled in Operation Impact. Florida Impact.

A By recollection?

Q By recollection.

A I'm sure I cannot recall the names of twenty-two people.

Q I'll try to help with that.

A And, I've not seen identification on any of these people. I believe that a Michele King is a member of Operation Rescue National's IMPACT Training School. A Meredith Raney is a student in Operation Rescue National's [p. 234] IMPACT Training School. Chet and Joanne Galliger (phonetic) are students with Operation Rescue National's IMPACT Training School. Brent Cadle is a student of Operation Rescue National's IMPACT Training School.

Q Is that your son?

A Yes, sir. It is.

Q How old is he?

A He's sixteen years old, not twenty.

Q All right. What is his first name again?

A Brent, b-r-e-n-t. I believe Richard Blynn (phonetic) is a student with Operation Rescue National IMPACT Training School.

Q Spell that last name.

A I believe it's B-l-y-n-n. I believe Oren (phonetic) and Ardith (phonetic) Cooper are students of Operation Rescue National IMPACT Training School.

As I said, I don't have a list. I don't have that printed information or was not requested to provide that for specific names. Those are the ones that immediately come to mind.

Q All right. Now, other than Brent Cadle are the other names you've given us people who are from out of town?

A Out of –

Q Florida?

A Florida. Meredith Raney is a resident of Florida.

[p. 235] Q Okay. And, is – and the otherwise, the others, Michele King, for instance, is from out of state?

A Yes. I believe all the others are from out of state.

Q Now, if you will, describe this course being offered by Florida IMPACT.

A I would be glad to.

Q Just briefly, if you will, tell us how many weeks and what the training program consists of.

A The training program is scheduled to last twelve weeks. I believe we're through the ten weeks or this is the tenth week. The purpose of the training school originally was to raise up, train, and equip people to be leaders in prolife ministry.

Some of these students have come out of Bible school, some of them are already involved in prolife ministry and desire to become better trained so they might serve in prolife ministries in their respective locations.

Q And, is there a curriculum? Is there a book or handbook used in the training program?

A There is not a set book or curriculum as supplied by the school. There have been a variety of teachers, one,

two, sometime three different instructors each week that have come in from out of town to teach in different areas. Some of those have have had handouts. Some of those have had books [p. 236] they have previously authored, that they have used. Some of them put together outlines to use for their specific teaching.

Q All right, sir. And, who have been the teachers?

A Some of the teachers, we've had Dr. Bevery McMillan (phonetic). She's an obstetrician-gynecologist, a former abortionist from Jackson, Mississippi.

MR. WEISS: Your Honor, at this time I would interpose the same objection. The names of the teachers have absolutely nothing to do with the sanctions that have relevancy or materiality to this issue.

THE COURT: For the same reasons earlier mentioned, overruled.

MR. D'ALEMBERTE: And, Your Honor, I might say again, if it will help counsel –

THE COURT: Overruled.

MR. D'ALEMBERTE: I don't think it refers to his clients.

Q All right. Dr. McMillan, who else? Just the names if you will.

A Dr. Beverly McMillan, she was a former abortionist.

Q Just the names, if you will.

A The Reverend Pat Mahoney, Reverend Paul Schenk.

THE COURT: Spell that, please.

THE WITNESS: I believe it's S-c-h-e-n-k.

A Reverend Rod Aguillard.

[p. 237] THE COURT: Would you spell that for me.

THE WITNESS: I believe it's A-g-u-i-l-l-a-r-d.

A Reverand Richard Exley. I believe that's E-x-l-e-y.

THE COURT: E-x-l-e-y?

THE WITNESS: I believe so.

A Randall Terry, Reverend John Kelly, Steve Wood. If I had a brochure, I could probably remember the rest. I'm not sure. There have been some that I have not been personally familiar with nor been in the classroom when they've taught.

Q I think you referred to a brochure. Is this the brochure you're – I'm showing him Plaintiffs' UU for identification. Is that a brochure?

A Yes. Reverend Gordon Peterson and Reverend Flip Benham.

THE COURT: What was that name again?

THE WITNESS: Flip, F-l-i-p, Benham, B-e-n-h-a-m.

A I believe that's all.

Q Okay. Now, in conducting this IMPACT Training, is there some field exercise in which the IMPACT training uses?

A The basis for the training is to teach students to implement those things that they're being trained in. So, typically although not everytime, the teachers that have come in have that have taught on a particular subject. And, usually the student go out and apply or part of their homework or assignment related to the teaching is to go out and [p. 238] apply those things that they've been taught.

Q Okay. And, during the time the students are in this school are they connected with the school and the school's operations during their entire time? Are they –

A No. They're individual agents.

Q Are they living in a school dormitory?

A No, they're not.

Q Are they kept together in anyway at all during the day? Are they housed at a common place, that kind of thing?

A In a classroom setting.

Q Only in the classroom. I noticed, I believe, in some literature that residential arrangements were also made for these people from out of state?

A They're staying in individual family homes –

Q All right, sir.

A – different families in the community.

Q All right, sir. In terms of a participation in demonstrations when they're in the IMPACT training, do they all participate as a class in the IMPACT training?

A Typically they would participate as a class. They often times have individual assignments. There may be teams of two. They maybe divided up in a number of different directions.

Q Let me ask you if any of these field exercises have been involved in residential picketing?

[p. 239] A Yes.

Q And, would you describe the nature of that residential picketing?

A Are you asking to describe what is residential picketing?

Q No. The exercises they were engaged in.

MR. WEISS: Your Honor, I'll interpose another objection. Your decree says trespassing, sitting in, blocking, obstructing ingress, egress from a facility in which abortions are performed. The relevance of these folks going to these residential dwellings with respect to imposition of sanctions here today is irrelevant.

It says abortion clinics. That's what they're prohibited from doing in paragraph one of our order. And, two, is abusing persons entering or leaving abortion facilities or directing others to take that action.

MR. D'ALEMBERTE: That's exactly the point, Your Honor. By going into residential picketing, embarrassing people in their – in their residential areas. The idea is to try to discourage people from either going to – going to participate in the activities of the clinic. That's the whole purpose of residential picketing.

MR. WEISS: It's also not a violation of your order, and therefore, irrelevant. How are they going to be held in contempt of an order for picketing? Can they be held [p. 240] in contempt for picketing residents when it wasn't told that, no, they can't picket in front of a residence. I mean, the First Amendment still holds.

THE COURT: It depends on the extent of picketing. If the picketing was so intense that they couldn't leave their homes, then it's interferring with whatever their businesses are. If their business is one of these businesses, then that is an interference at the residence of the business.

MR. WEISS: Your Honor, it's just that your order says trespassing, sitting, blocking, and obstructing, blocking ingress and egress from a facility at which abortions are performed.

Two, physically abusing persons entering, leaving, working, or using the services of the faciltiy [sic].

Three, attempting or directing others to take those actions.

Residential picketing is not anywhere mentioned in here. I don't see the relevance of it.

CADLE: I believe, in fact, Your Honor, it relates to motion two of this order.

THE COURT: Again, under the theory that I spelled out, it depends on how intense the picketing is. Conceivably the evidence might reveal that it's so intense, you know, that persons living there just don't [p. 241] leave out of fear. Which would then interfere with these clinics.

I don't know. You know what the evidence is more than I do.

MR. WEISS: Judge, I got notice of this on Monday. I know about as much about this as you do.

MR. D'ALEMBERTE: Well, I think I can tell Mr. Weiss all that is the really important thing to know for his clients, I don't think any of this relates to his clients, Your Honor, of this witness at this point. I'll be happy to inform him when I get into something that does.

May I continue, Your Honor?

THE COURT: If you would.

Q Mr. Cadle, we saw one example of residential picketing on a video tape. You were in the room; were you not?

A I was in the room during the video tape, yes, sir.

Q Now, is there another form of residential picketing that gets a lot more personal as to the people who are targets of residential picketing?

A I would not refer to what we saw in the video tape as residential picketing.

Q All right, sir. Then tell me. That might help draw a brighter line. Have there been some activities, in fact, [p. 242] where IMPACT team members have actually taken literature around to neighbors?

A Not that I've been involved in or have firsthand knowledge of.

Q All right, sir. But, do you know whether that has been a technique of rescue – of rescue – of Operation Rescue Florida IMPACT exercises?

MR. WEISS: Objection, your Honor. It calls for a hypothetical.

MR. D'ALEMBERTE: No. If he has knowledge of it is all I'm asking. No hypothetical. Does he know it.

A I have no firsthand knowledge. I – To the best of my recollection, I have not been on a residential picketing excursion, if you will, with the Florida IMPACT team.

Q All right, sir.

A I was present – At the video showing, I was present there that day having a prayer vigil.

Q But, you don't define that as residential picketing?

A I personlly [sic] don't, no.

Q Okay. Now, have you any knowledge, whether first hand or not, of residential picketing in which people's homes are visited and their driveways are blocked and their doorways are blocked?

A I have knowledge of anyone whose driveways or doorways being blocked. I have secondhand knowledge of [p. 243] residential picketing, meaning walking with a sign. My definition is to walk with a sign on the public right-of-way in a neighborhood.

Q And, that secondhand knowledge is from hearing from Florida IMPACT, from people associated with Florida IMPACT training program that's been done?

A Yes. And, I've personally participated in times past –

Q All right, sir.

A – in residential picketing.

Q Now, how about the passing out of literature to neighbors relating to the identity of people and making accusations against staff people at the clinics? Do you have any knowledge of that being done by Florida IMPACT training program personnel?

A No, I don't.

THE COURT: What kind of literature?

MR. D'ALEMBERTE: Literature being passed out to neighbors accusing them, accusing the staff people of being murderers or that kind of thing, Your Honor. He said he has no knowledge. I'm move on.

Q Now, you saw in the video tape, did you not, a number of students from the Florida IMPACT training program were involved in those demonstration; did you not?

A I saw the students there, as well as a large number [p. 244] of other people.

Q Now, you saw some people who were doing some shouting; did you not?

A On both sides, yes, sir.

Q That's right. Now, you mentioned that Michele King was an IMPACT training student.

A That's correct.

Q Did the IMPACT training program teach students what to shout?

A Not to my knowledge.

Q Did they teach them what not to shout?

A I have been in the classroom a few minutes each day for the last ten weeks. So, I am not an expert to testify as to what's been taught or not taught during four hours or more a day –

Q Sure.

A – of classroom activity.

Q I'm only asking you to testify as to your knowledge. But, that knowledge –

A To my knowledge, the training that has been given related to sidewalk counseling was video that was shown, which I have previously seen. This video is by an instructor named Karen Black.

Q Okay. But, no instructions as to shouting? What to shout?

[p. 245] A Her instruction, her general teaching in this two hour video would be related to very soft, gentle, appeal of one on one relationship with someone entering an abortion clinic, offering them help, assistance, handing them literature.

Q You saw some shouting taking place on the video both on February twentieth and on March sixth; did you not? Shouting being done by –

A I believe so.

Q – anti-abortion protesters?

A I believe so.

Q As well, there were noises being made by others.

A Yes, sir.

Q Did you understand that that shouting was being directed toward a particular of the building?

A No.

Q Did you know where the surgical facility is in the building?

A I have no earthly idea.

Q All right, sir.

A I've never been in the building.

Q I understand. Have you ever been told what's inside the building?

A No, sir.

Q Okay. Do you know whether the Florida IMPACT team [p. 245] were told what's inside the building?

A No, sir.

Q Is there any particular reason for them to direct the shouting toward that particular area of the building as identified by the previous witness?

A I believe that probably what was taking place then, the general aspect and purpose of sidewalk counseling is first to try to hand literature and talk to and individual who is going coming into the parking area,

driveway, getting out of their car in the parking lot, walking towards the building.

Generally, any vocal action, whether it's soft, whether it's gentle, whether it's loud is directed to the parking lot where women maybe standing, maybe spending time prior to entering the building or if they come out and wait, I believe there is, at least it used to be visible a no smoking sign outside the building that you could see from the public sidewalk. And, so you see people come out and stand in the parking lot smoking cigarettes, I guess while waiting.

And, so my understanding is, the vocal action is related to those people that are visibly outside of the building.

Q All right, sir. Now, as to the words said by the IMPACT team member, do you know if they received any instruction about what to say?

A Not to my knowledge, no.

[p. 247] Q Okay. And, it's your testimony that you've never heard IMPACT team members being instructed to shout the words, words of threat at the –

A Absolutely not. If anything, the whole philosophy, the whole principle and underlying attitude of the teaching that I have seen or been present in front of would be the exact opposite.

Q All right, sir. And, so the students who would be shouting and screaming as Michele King was doing on March 6, 1993 were actually violating the IMPACT team training?

MR. WEISS: Your Honor, I don't think –

A No, sir.

MR. WEISS: – it's been established that Michele King has been screaming. I don't think she's ever been identified by name.

MR. D'ALEMBERTE: She was by name while the video tape was being shown. And, it was on the three, six, ninety-three video tape at twelve forty.

THE COURT: I believe that's correct, counselor.

Q And, the screaming was quote we will be everywhere. Quote no peace, no rest. And, there was said before avenge, but avenge was said. And, she said something about your worse nightmare. That was at approximately twelve forty on that tape of three six, ninety-three.

Do you know whether or not Michele King, who you [p. 248] said was a student in Florida IMPACT, was counseled not to shout such things?

A I have no idea. I don't even know if I was there at the time.

Q Okay, sir. Now, you also saw a woman on February 20, 1993, who was identified as Jessica. I don't believe you named a student named Jessica. Is there a such person who is a student?

A Yes, I believe there is.

Q Is that her we saw on video tape indentified by the witness as Jessica, a thin young lady with a pony tail and jeans?

A I don't recall who was pointed to.

Q What is Jessica's last name?

A I do not know the spelling. The last name is Oochman (phonetic).

Q All right, sir. And, do you happen to know where she's from?

A No.

Q All right.

A I believe North or South Dakato [sic].

Q Okay. And, you also saw some ladders being engaged, actually ladders where people were up over the fence and shouting into the clinic. Did you see that on the video tape?

A I believe so, yes.

[p. 249] Q Do you recognize the people who were on ladders?

A I don't recall at this time.

Q All right. Now, there was one ladder with a man holding up a sign identifying on the sign a significant other of some woman who was in the clinc [sic]. Do you know who that man was?

A I don't recall at this time.

Q Do you remember seeing that incident that day?

A I don't remember – I remember seeing it on the video. I didn't pay attention to the video as to who that man was. I don't remember if I saw it that day or if I was

there that day. I don't know if I was there at all for these demonstrations.

Q I understand. Do you know whether it is a technique of putting up ladders on the fence and holding up signs over the fence and shouting to people inside the clinic over the fence; is that part of the training of Florida IMPACT?

A Not to my knowledge. For years people have set up ladders so they can get up over high wooden fences and be able to speak to women coming in. That has been a common activity by a variety of people.

Q It's peeping over fences. Why do you think the fences are put there?

A At one time we had access to the property behind Aware Woman with permission of the owner of that property. [p. 250] So, sidewalk counselors were not on the sidewalk, but were allowed to stand behind the property and offer literature and try to talk to women as they came in.

Q You think privacy?

A I believe it was put there so the offers of help would not be heard by the women.

Q So, the privacy of the woman has been protected.

A I don't believe it has anything to do with privacy.

Q All right, sir. Have you had continued contact with Randall Terry?

A Continued contact?

Q Uh-huh.

A He was present here several weeks ago. He came and taught for a day at the IMPACT training and spoke at a Friday night rally in Palm Bay, Florida.

Q Has that been the way it's been conducted, there is a week of training in Florida IMPACT, followed by a Friday night rally, and Saturday demonstration at Aware Woman Clinic? Isn't that the way it's been working?

A Typically, there has been one, two, probably at the most, teachers during a week. One may come in Monday and Tuesday. Another may come Wednesday, Thursday. And, another may come in on Friday. Whoever is there teaching at the end of the week speaks at a public rally on Friday night.

Q Now, have you see Mr. Randall Terry quoted in the [p. 251] press as saying that the objectives of the activity are to make those involved in clinics as miserable as you can through embarrassment and intimidation. Have you heard Mr. Randall Terry say those words?

A Have I seen that in the press?

Q Or, first, have you seen it in the press?

A No, not to my knowledge.

Q Have you seen or heard Mr. Randall Terry express that general philosophy?

A I cannot recall hearing him say those words.

Q Or something similar?

A I've heard him preach sermons in a number of churches on a number of different occasions. I don't remember those specific words.

Q All right, sir. Did you see the A. B. C. World News Report on March eighteenth, 1993?

A The evening news?

Q Uh-huh.

A I don't believe so.

Q All right, sir.

A I'll be honest. There is so much news. I can't recall specifically.

THE COURT: What date, counselor.

MR. D'ALEMBERTE: It was March 18, 1993, Your Honor, evening news report in which Randall Terry –

[p. 252] MR. WEISS: I believe Mr. Cadle said he didn't hear that report.

Q Did you hear Mr. Terry make that statement?

A I don't believe so.

Q Okay. Let me show you, well, first of all, let me follow up. Are you involved in fund raising for your ministry?

A I am involved in personal fund raising to support myself, yes.

Q And, have you sent out fund raising letters?

A Yes.

Q And, does the appeal for funds include references to what has been accomplished by your movement?

A Probably so.

Q Okay. Is it part of your claim to accomplishment that you have actually been able to keep people away from clinics?

A I don't believe so, no.

Q Okay. That you slowed clinics down?

A I don't believe so, no.

Q Now, have you actually sought a business license from the City of Melbourne?

A Have I personally?

Q Are you for any organization that you represent?

A For private business purposes, yes.

[p. 253] Q Other than the realtor business, I'm talking about a business now connected with the anti-abortion movement.

A I sought a private business license for a private business.

Q Connected with the anti-abortion movement?

A Allowing facilities to be used by prolife movements.

Q What is that business?

A Christian Marketing Services.

Q That brings me back to my first question about the organizations that you belong to. Now, I think we've

established Operation Goliath, Operation Rescue National. And, if you will give me the other organizations or movements that you are connected with or other campaigns.

A I'm not trying to avoid the question. Christian Marketing Services is a private business. So, I did not mention it previously.

Q Okay.

A It's a for profit corporation.

Q Okay.

A So, it's a private business that I just mentioned, not an organization.

Q Okay.

A In my mind not an organization.

Q What is its business just so we'll –

A Just marketing and public relations.

[p. 254] Q Connected with the prolife movement?

A Not directly, no.

Q Indirectly?

A Well, it's allowing facilities to be used by members of the prolife movement for ministry office space.

Q And, Operation Rescue National, Operation Goliath, any other organizations that you are associated with or movements or campaigns.

A My personal support is raised through an unincorporated religious association of the Prolife Action Ministries.

Q Okay. Is that just an informal organization or –

A It's an unincorporated religious association.

Q Okay. Does that now exhaust all of the organizations or movements or campaigns that you've been involved with?

A I believe so.

Q Now, you mentioned that Mr. – I'm sorry – Mr. Meredith Raney was a student at this school. Do you know to what extent Mr. Raney's activities in the period since the first of this year were activities encouraged by the Florida IMPACT training program and what extent they were things he was doing on his own?

A I have no idea what he does on his own. I know that he is in the classroom typically with the IMPACT training [p. 256] school and if the school goes as a group somewhere, then he is typically with the group.

Q Let me ask you, if I may, Mr. Cadle, there were some wanted posters that have been seen in the courtroom earlier. Have you ever participated in the printing up or distribution of these wanted posters relating to staff or physicians of the clinics or owners of the clinics?

A Not to my knowledge. I'm familiar with them. I've seen them for several years, different types of fliers. I've seen different types of wanted posters from other states, from other areas. I've seen the local ones that have been discussed.

I've not been – I have not authored one. I've not been involved in printing and distribution. I've probably held them in my hand. I may have handed one to someone. I don't recall any specific instances.

Q And, you've not collected them to take them out and distribute them to places.

A Not that I recall.

Q And, if you now, at any point, distributed literature in the wanted poster form or some other kind of identifying material in neighborhoods related to staff or physicians or owners of the clinics?

A I don't recall having done that.

MR. D'ALEMBERTE: Okay, Your Honor, may I just [p. 256] have a moment?

Q Have you been engaged in anyway with taking license tag numbers and looking up the license tag numbers and doing mailings to people who have been at the clinic.

A I have looked up license numbers. I don't believe I've mailed any literature to people. I've taken people's license number and gone to the tag office where you buy your license tags.

Q What did you do with the information when you got it?

A It's been several years since I've done that.

Q Uh-huh.

A I believe that in one instance we were not – we were curious as to who the abortionist that was coming to

Aware Woman was. I took the license number, went to the tag office. They looked it up for me. They provided the abortionist's name who was coming from Jacksonville, Florida.

Q That's all you did?

A The next time I was able to call him by name as I talked to him.

Q But, no mailings or residential picketing directed towards that person.

A Not toward that individual, no. That's been several years ago.

MR. D'ALEMBERTE: May I just have a moment, [p. 257] Your Honor?

THE COURT: Sure.

Q Okay. Just a couple of names. Do you know Mr. Al Noah (phonetic)?

A Yes.

Q And, who is he?

A I believe he resides in the Orlando area. I've never been to his home. I've met him probably on two or three occasions at prolife activities. Perhaps at a rally. I believe he's come over to some of our Friday night rallies.

Q Okay. And, do you know whether he is a member of any movement or organization?

A I have no idea.

Q Have you identified him at all with Rescue America?

A Not to my knowledge.

Q Okay.

A I believe he did come to Baton Rouge, Louisiana this past summer. Operation Rescue National held activies [sic] there. And, I believe that he came there.

Q Okay. Now, one term which I did not ask you to identify earlier was rescue. What is a rescue?

A Proverbs twenty-four eleven, from the Bible says to rescue those who are unjustly sentenced to death, not to stand back and let them die. And, Proverbs verse twelve says if we didn't know this, does not God who knows our hearts know that [p. 258] we knew and judge us accordingly?

So, I believe that a rescue is anything that tries to stop someone who is being unjustly sentenced to death.

Q All right, sir. And, is disrupting a clinic operation a part of the rescue tactic?

A Not to my knowledge, no.

Q All right, sir. And, did you know a reporter by the name of Cheryl Reed for Florida Today?

A As I recall she, some years past worked at Florida Today. I don't believe I've spoken to her or seen her in –

Q Okay.

A – in several years.

Q Do you recall talking to her about your definition of what a rescue is?

A Not at all. I haven't seen her, to my knowledge, in several years.

Q Okay, sir. Do you know if you talked this year to a reporter named Stephanie Rice of Florida Today?

A I talked to Stephanie, probably at least fifty times this year.

Q Do you recall being interviewed for an article which appeared on February sixteenth of 1993?

A No.

Q Do you recall telling Stephanie Rice the following, "Part of what the students" in context if you'll accept this [p. 259] as students at IMPACT. "Part what the students are doing is gathering the information on the employees and we'll be increasing this Cadle said adding that they were unaware two of the women no longer worked at the clinic which performed abortions. Quote I wasn't there, but I sincerely doubt that anyone chased White or did anything to endanger themselves or others. Do you remember making that statement?

A Not specifically. I believe she called me related to some activities at which, as you could tell, I wasn't there. I've spoken to her probably fifty times. I've done probably three hundred interviews since the beginning of the year with various media. So, I don't subscribe to a newspaper or watch the news.

Q Do you recall being interviewed by Mimi Hall of U. S. A. Today in February of this year?

A No.

Q I apologize, Your Honor, this is February of 1992 I'm referring to. February of 1992, do you recall?

A I recall being interviewed with her sometime a year or more ago.

Q Do you recall telling Mimi Hall that you had participated in putting up wanted posters around Melbourne?

A I don't recall telling her I participated. In fact, she has since run a retraction related to the statements from that article in U. S. A. Today approximately two weeks ago. [p. 260] There was a number of misstatements there that she retracted.

Q This is a 1992 article.

A I understand. She took items from that which I had denied and she printed as true. She took those items, inserted them into an article written since the IMPACT team training school had been started by Debra Sharp, another reporter for U. S. A. Today. She inserted those without her name attached to them. When we complained the false information from a previously false written article had been inserted, they ran a retraction.

Q And, you deny having put up wanted posters?

A I don't recall. I know they've been put up. I don't recall personally putting any up.

Q Okay. Do you know who put them up?

A I have no firsthand knowledge, no.

Q Do you know who put them up, Mr. Cadle?

A No, sir. I don't.

Q Okay. Did any members of your family participate in that?

A Not to my firsthand knowledge, no, sir.

Q Have you heard from any member of your family that they participated in that?

A No, sir.

Q Have you heard from anybody else that they participated in putting up wanted posters?

[p. 261] A As I previously testified, I have seen these wanted posters for years being distributed here. I am familiar with them. I've seem them. I've probably heard hundreds of conversations related to them. I don't recall any specific individuals putting them up. I don't recall being somewhere where someone put them up.

Q Okay. Do you recall in February of 1992 talking to Stephanie Rice of Florida Today and describing to her the tactic of tracing license tags?

A I don't recall talking to her a year ago, no. I'm sure I talked to her in that calender year probably at least a hundred times.

Q Let me quote a paragraph from this article in the Miami Herald, February 18, 1992, and see if this speaks, see if this seems to be a truthful statement derived from an interview with you.

"Brevard County, Operation Goliath has started tracing the license plate numbers on vehicles that women drive to visit the Aware Woman Clinic, Chapter Director

Bruce Cadle said. The clinic off U. S. One in Melbourne provides abortions, contraceptives, and pregnancy counseling."

Do you recall having given Stephanie Rice that kind of information?

A Did you say it was from the Miami Herald?

Q That's the way it looks to me. But, it looks like a [p. 262] reprint from the Florida Today.

A She's a reporter with Florida Today. I don't recall. I don't recall specific interviews from a year ago with any reporters.

Q All right, sir. Now, following the entry of the court's injunctive order in, the original order in October 1991, there were some plans made to start this IMPACT school, was there not?

A Sometime probably last spring or summer.

Q And, you actually circulated literature to bring people to Florida; did you not?

A Operation Rescue National did it.

Q And, you're southeast director of that. We've established that.

A Correct.

Q And, you knew about that plan to do that; did you not?

A I knew that they were going to include brochures related to the training school in their, I believe, their national mailing. I believe they were –

Q And, you participated in the development of those plans; didn't you, Mr. Cadle?

A In the plans for a training school?

Q Yeah. For the training school.

A Yes. I had discussions related to holding a [p. 263] training school here.

Q You helped design the program and marketing even for that – for that training program; did you not?

A No. I saw the brochure for the training program after it was printed –

Q Okay, sir.

A – this past summer.

Q And, you helped distribute the brochure; did you not?

A I probably put stacks of them on materials tables at churches or prolife rallies for people to be able to pick up a brochure.

Q Did you individually –

A I probably passed them out to individuals that were interested.

Q Did you also individually recruit people for that training program?

A I have, as I recall, I have announced at prolife rallies and churches this training school was going to be made available and encouraged people to consider people coming. I've handed out the brochures for the training schools. So, I would assume that's recruiting.

Q All right, sir. Do you know that there's also been coordination with other organizations relating the weeks ahead of this training program, I mean in the future plans in [p. 264] conjunction with other organizations to stage larger rallies?

A I'm not sure what the question is. Related to the IMPACT training school?

Q Well, the IMPACT training school is ending when, sir?

A April ninth and then the plan is to repeat the IMPACT training school this coming summer in Minneapolis, Minnesota.

Q Now, are there any plans for April ninth and tenth, in that time to celebrate the end of IMPACT training?

A No specific plans.

Q Well, how about general plans, Mr. Cadle?

A Well, typically we've been holding rallies every Friday night and then going to Aware Woman on Saturdays. The one Saturday that we viewed, they were not doing abortions on that Saturday so we held a prayer vigil over in Melbourne Beach at the Windle's condominium.

We don't have a church lined up yet for April ninth.

Q But, you're trying to; aren't you?

A For a rally.

Q But, you're trying to do that; aren't you?

A Oh, we're trying to. We've been holding rallies every Friday night. But, we have no specific plans. We have no church lined up.

Q Aren't you trying to make those plans? And, aren't [p. 265] those plans involve the recruitment of other organizations and recruitment of people from around the country to come?

MR. WEISS: Your Honor, I'm going to interpose an objection. When they held a rally, where they hold a rally, has nothing – if he asked the question are they going to instruct them in the rally to trespass and instruct them to violate the order it becomes relevant. That's totally irrelevant what church they may hold the rally in. What they do at that rally might violate it.

MR. D'ALEMBERTE: Your Honor, I'm just trying to get to the point –

THE WITNESS: We have no firm plans related to April ninth –

Q No firm plans?

A – or tenth.

Q Do you know other organizations have also sent literature asking people to come to Melbourne April ninth and tenth?

A In some literature which you showed me last night I saw a group called Youth for America, I believe it was called, encouraging young people to come here.

Q And, that happens to be the ninth and tenth?

A I believe that was the dates on it.

Q And, is that the first time you had any knowledge that Youth for America was doing that recruiting?

[p. 266] A Youth for America typically comes anywhere there's prolife activity.

Q Well, any particular reason April ninth and tenth would be specified in that literature.

A It's spring break, to my understanding.

Q And, so the thought is by going at spring break there would be a larger crowd? Is that the idea?

A I believe that they have seen fliers distributed by the Feminist Majority Fund across the country encouraging people to spend their spring break breaking Operation Rescue in Florida. So, they decided they desired to bring some young people here as well.

Q So, you would expect then the intensity of demonstrations to increase as we get into April?

MR. WEISS: Object to the form, Your Honor.

A No.

MR. WEISS: Intensity is vague and ambiguous?

What's intensity.

MR. D'ALEMBERTE: If he can't answer it, counsel, perhaps he can say so. So far as I know none of his testimony is related to your clients. This is just slowing things down.

MR. WEISS: It's still vague and ambiguous.

THE COURT: Overrule the objection.

A I have not seen any increase in intensity. We have [p. 267] been having a very similar attendance every Friday night at our rallies. We've been having a very similar attendance every Saturday with the exception of the very first rally January twenty-second, which was the memorial of Rowe versus Wade. That was a larger rally attended by more people. And, the next day there were more people in the street than would be typical.

Other than that our attendance at our rallies has averaged three hundred. It has not changed depending upon which church we were. I has not changed depending upon who the speaker was. It's very consistent on Friday nights, very consistent on Saturdays. We average probably seventy-five to a hundred people.

Q Okay. Mr. Cadle, one additional organization. Who is the Woman's Legal Action Coalition?

A I'm not sure.

Q Have you never heard of that organization?

A I have seen their literature. I've seen it in connection with Meredith Raney offering assistance to women who may have had an abortions and had damage.

Q Other than Meredith Raney, do you know of anyone else who is associated with –

A No, I don't.

Q – that?

A No.

[p. 268] Q And, Meredith Raney, for the record, is a man or a woman?

A A gentleman.

MR. D'ALEMBERTE: That's all I have. So far as I know, none of the testimony related to his clients. I think we said that earlier.

THE COURT: He has a right to cross.

CROSS-EXAMINATION

BY MR. WEISS:

Q Any of the organizations of which you're a member, since the entry of this judge's order, have you ever instructed anyone to trespass on, sit in, block or obstruct engress into or egress for any facility at which abortions are performed in Brevard and Seminole County, Florida?

A Absolutely not.

Q Have you at any time, yourself or instructed anyone to physically abuse any person entering, leaving, working or using any service at any facility at which abortions are performed in Brevard or Seminole County, Florida?

A Absolutely not. I'd be totally opposed.

Q You'd be totally opposed?

A Totally opposed.

Q Have you attempted or directed any others to take any of the actions I just described above?

[p. 269] A No.

Q Have you at all times fully complied with Judge Robert B. McGregor's order?

A Yes, sir.

Q Now, with respect to Judy Madsen, have you ever seen her at the Aware Woman Clinic in your life?

MR. D'ALEMBERTE: Your Honor, this is not in cross of anything in direct. I tried to move this along by stipulating that as to this witness did not have any testimony that. And, I see no purpose to this other than wasting time.

MR. WEISS: If he's willing to stipulate my clients haven't violated the sanctions and do so in open court; we'll pack up and leave.

MR. D'ALEMBERTE: No. I said this witness doesn't have that evidence. I've already said that Judy Madsen is not a target of these contempt proceedings. We said that in our papers, Your Honor.

THE COURT: You're exploring in areas that need not be explored.

MR. WEISS: Your Honor, the testimony, the only words attributable to Ed Martin, whatsoever in this case were Mr. Snydle. That's at the Aware Woman Clinic. I want to ask what we saw, if anything, with respect to my client.

[p. 270] Mr. Snydle said –

THE COURT: Your question was about Judy Madsen.

MR. WEISS: Okay. Then we'll switch gears. We'll talk about Ed Martin.

MR. D'ALEMBERTE: Well, Your Honor, that's not in cross of anything in direct. He can call this witness back if he wants to as his witness. I did not ask him. I made that point –

MR. WEISS: Can I take him out of order, Your Honor, to ask him, so I don't have to put him back in the box to ask him.

THE COURT: So long as, you know, it's understood that he's your witness that's answering these questions.

DIRECT-EXAMINATION

BY MR. WEISS:

Q Did you ever see Ed Martin block the entrance to Dr. Snydle at the Aware Woman Clinic?

A No.

Q Have you ever personally been followed by Aware Woman activists?

A Yes.

Q What – Do you know the names of the women activists?

THE COURT: Counsel, you're switching the focus. [p. 271] The focus is on your clients, not on others who are not subject to this court's injunction.

MR. WEISS: Your Honor, if the activities of third parties and the injunction may relate, these folks may have participated in violating the injunction. I mean if their organization –

THE COURT: It maybe. But, it's not relevant to this inquiry. The inquiry is directed against your clients.

Q Have you ever made a threatening statement to a single person in front of the Aware Woman Clinic?

A Not that I can ever recall, no.

Q Have you ever made a threatening telephone call to anyone associated with the Aware Woman Clinic?

A Never.

Q Have you or any – Have you ever swarmed around a car or attempted to trap any patient, family member or clinic staff?

A Never.

MR. WEISS: Nothing further.

THE COURT: Mr. Cadle, you have a right to respond as you would if you were – if you had a lawyer representing you. Do you have any additional information that you want to bring to the court?

MR. CADLE: Yes, Your Honor.

[p. 272] I have never trespassed on the property at Aware Woman Center for Choice in Melbourne, Florida. I

have never been arrested at that property. I have never been charged with blocking ingress or egress for that property. I have never instructed others to do any of those items.

I have never violated this court's order since its origination as a temporary restraining order nor as a permanent injunction.

I have not seen Reverend Ed Martin in Brevard County for over two years. And, when I saw him, it wasn't at Aware Woman Center for Choice.

I am affiliated with Operation Rescue National. I have been affiliated with Operation Rescue National, and have participated with Operation Rescue National over the last three years.

I was never affiliated with Operation Rescue. They are totally different organizations. They are totally distinct organizations. They are totally separate organizations. I have never been connected with the Organization Rescue as it is described – as it is named in this court order.

I have been followed by staff. I have been followed by members of the plaintiffs' family. I have been followed –

[p. 273] THE COURT: I didn't let him get into that. I'm going to have to cut you off about what others have done to you. That's shifting the focus. And, the focus of this hearing are on your activities and the activities of others that are here.

MR. CADLE: So, if I have been receiving death threats, if we have been receiving bomb scares at our

churches, at our offices, and my home, these are not relevant?

THE COURT: No. They're not part of this injunction. Okay. Are you finished?

MR. CADLE: The only other thing I would like to say, Your Honor, I believe there is a total misunderstanding of the differences between Operation Rescue and Operation Rescue National. It is not a semantical difference. The directors are totally different and have always been different. They have always been in totally different locations in totally different states.

The organization that I'm affiliated with has never been legally connected to Operation Rescue. It is not a party to this court order.

The IMPACT Training School has also been listed as an Operation Rescue National activity.

THE COURT: Have either of those organizations used the name Rescue National America?

[p. 274] MR. CADLE: I've never seen that name. I think that's actually a typographical error. I've never seen that name used. Rescue America is the entity that I've seen. I've never seen the name Operation Rescue America.

THE COURT: At the time the court entered the injunction, knowing the court's use of those particular names that you now contend are totally unrelated to your invovlement [sic], why did you not bring it to the court's attention at that time that these or somebody's got the wrong names?

MR. CADLE: As far as I was familiar with Operation Rescue National, of which I'm affiliated, was just never named in the court order.

THE COURT: There are a bunch of organizations with people associated with them that you say are totally unrelated. You know if the court has made a mistake and you are aware of it, it would seem to me, it would be incumbent on you to bring that to the court's attention?

MR. CADLE: My understanding is Rescue America was being represented by counsel. And, I assumed that they would differentiate betweem [sic] Operation America and Rescue America.

My understanding was Randall Terry was being named as the founder of Operation Rescue, which I've not been connected with either of those organizations. So, I [p. 275] didn't understand that I should come and share any insight I had into other organizations I wasn't connected with, I believe. I was connected to Operation Goliath.

Okay. That's all, Your Honor.

MR. D'ALEMBERTE: May I, Your Honor?

THE COURT: Go ahead.

CROSS-EXAMINATION

BY MR. D'ALEMBERTE:

Q Mr. Cadle, a moment ago you indicated adamantly that you've never been arrested, never instructed

people to violate the injunction, never involved in trespass and so forth, you said at the Aware Woman Clinic. Was that because if you had not limited it to that place, you've have to change the statement that you had not been arrested for trespass and for going to a clinic facility and for instructing people to do these things at other –

MR. WEISS: In Seminole and Brevard County.

Q At any other place in the country.

MR. WEISS: Your Honor, it's irrelevant and immaterial what this man does outside the jurisdiction of this court. He's being held or charged with contempt of court of your order, which is Seminole and Brevard. What he does in Australia is not in the bailiwick of this sanction.

[p. 276] THE COURT: Sustained.

MR. D'ALEMBERTE: Your Honor, may I proffer this for the record so at least it's part of the record. My reason for doing this is that I believe that your injunction has been entered. And, this person has demonstrated he is certainly involved with certain activities and may have given instructions and otherwise participated in activities which, indeed, are not only in violation of this injunction but maybe illegal.

THE COURT: That goes to the second motion. The court is not hearing that. You'll have to produce that another time.

MR. D'ALEMBERTE: All right, Your Honor. Thank you, sir.

Q Now, on the point I wanted to inquire on, Mr. Cadle, was the idea that these organizations are totally different organization: Now, as I heard your testimony, you told us they were not quote legally connected. Are those your words?

A I believe so.

Q Well, indeed, they're not legally organizations; are they?

A Yes. To my knowledge they are.

Q Okay. Well, then, it's my understanding Operation Goliath has never been legally organized.

A No. I thought you were talking about Operation [p. 277] Rescue versus Operation Rescue National.

Q So, we've got Operation Goliath legally organized?

A Correct.

Q I thought you told the judge that was a campaign.

A Correct.

Q Now, Operation Rescue National, is that an incorporated organization or partnership?

A To my knowledge it is an unincorporated religious association in South Carolina.

Q All right, sir.

A I say to my knowledge. That's what's been told to me.

Q Okay. Have you ever seen any documents which demonstrate that is the case?

A No.

THE COURT: Which organization is this?

MR. WEISS: I think he was talking about Rescue National, Your Honor.

Q And, so it is an unincorporated religious organization?

A To my knowledge.

Q Have papers been filed with the Secretary of State or court somewhere that makes them such an organization or is that just arrived at by announcing there is such a thing?

A I'm not sure. I know there was litigation in the [p. 278] State of South Carolina. I heard there was some type of action related to that. And, I don't know. I know that the State stopped that action against Operation Rescue National. I don't know if that meant papers were filed with the State.

Q So, you don't know the form of the organization at all?

A No, not firsthand.

Q Do you have any other knowledge other than the fact you just know there were some legal proceedings somewhere around?

A I've been told by the director, executive director that this is an unincorporated religious organization in South Carolina.

Q So, the unincorporated association is just the same thing that Operation Goliath was? A group of people who got together –

A No. That's not my understanding.

Q What is the difference between Operation Rescue National that you understand –

A My understanding is there are documents. I don't know if they're filed with the Secretary of State. As you asked my understanding, it is an organized as a religious association and has formal documents prepared, formal minutes, officers, directors.

Q Some agreement among the people at least?

[p. 279] A That's my understanding.

Q Is your name on those documents?

A No.

Q You've never seen those papers?

A No.

Q How do you know the form of Operation Rescue? What form?

A Again, my understanding is from having been told, not seeing any documents. It's my understanding it's a D. B. A., Randall Terry doing business out of New York.

Q So, Operation Rescue, he's doing Operation Rescue?

A That's my understanding.

Q Randall Terry is a prolife activist; is he not?

A Well, he speaks at rallies, church meetings for probably every prolife organization in the country. He's probably spoken all over the country. To my knowledge, he is not connected with any formal organizations.

MR. WEISS: One more question, Your Honor.

REDIRECT-EXAMINATION

BY MR. WEISS:

Q And, he, indeed, was one of the people that came to the IMPACT School ran by Operation Rescue National?

A He came on a Friday. I said he taught. Actually he is currently the host of a two hour daily live radio talk [p. 280] show, nationally syndicated talk show.

So, the teaching, he spoke with the class in the morning. They got to participate and watch him broadcast remotely his two hour daily talk show and got to ask him questions about doing live interviews.

He participated in the rally on Friday night. And, he appeared briefly on the video we saw.

Q And, that was all Operation Rescue National?

A That's who he was here for, to teach training for.

Q So, legally they are not connected, but they are connected with Randall Terry?

A I don't understand the legal definition of connected.

MR. WEISS: I don't have any further questions, Your Honor.

MR. D'ALEMBERTE: Nothing.

THE COURT: Mr. Cadle, anything further?

MR. CADLE: No, Your Honor.

(Whereupon, the foregoing proceedings were recessed at 3:00 p. m.)

IN THE CIRCUIT COURT OF THE
EIGHTEENTH JUDICIAL CIRCUIT
IN AND FOR SEMINOLE COUNTY, FLORIDA

WOMEN'S HEALTH CENTER, INC., AWARE WOMAN CENTER FOR CHOICE, INC., EPOC CLINIC. INC., AND CENTRAL FLORIDA WOMEN'S HEALTH ORGANIZATION, INC.,	CASE NO. 91-2811-CA
Petitioners,	
vs.	
OPERATION RESCUE, OPERATION RESCUE, AMERICA, OPERATION GOLIATH, ED MARTIN, BRUCE CADLE, PAT MAHONEY, RANDALL TERRY, JUDY MADSEN, AND SHIRLEY HOBBS,	
Respondents.	

BEFORE THE HONORABLE
ROBERT B. MCGREGOR
JUDGE OF THE COURT

A hearing in the above style cause was held at 1:30 o'clock p. m., on Tuesday, the 23rd day of March, 1993, in the Courtroom of the Seminole County Courthouse, Sanford, Florida, before Margie L. Breit, Notary Public for the State of Florida at Large.

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[p. 285] WHEREUPON:

The following proceedings were had:

MR. D'ALEMBERTE: Your Honor, by agreement of counsel, we would not call Mr. Martin, but because you are going to call him as a part of your case.

MR. WEISS: Not based upon the testimony.

MR. D'ALEMBERTE: Just to expedite matters –

MR. WEISS: I'm not going to call him.

MR. D'ALEMBERTE: Your not going to call him. Then, in that case we'll call him now.

THE COURT: All right.

MR. WEISS: I just – He just left, Your Honor. I mean, he had a family emergency. I couldn't – I could go see if I could catch him. He's not under subpoena.

THE COURT: Now, don't do that to me. Go get him, Mr. Bailiff.

MR. WEISS: I'll go get him. Judge, I had no – He had a family emergency.

THE COURT: Oh, hog wash.

MR. WEISS: Your Honor, I'll be glad to put him on the stand. I have no problem with putting the man up

there. There's been no testimony regarding him in this court. I'll be glad to put him on the stand.

I don't mean to offend the court. And, if I've done so, I sincerely apologize.

[p. 286] THE COURT: If it's been engineered by you, you sure have, counsel.

MR. WEISS: Your Honor, I certainly did not do so and I apologize.

THE COURT: You're responsible for your clients.

MR. WEISS: I agree. He said to me, he said –

THE COURT: Then, go get him and get him back here.

MR. WEISS: I will. He just stepped out of the door thirty seconds ago.

THE COURT: Is he under subpoena?

MS. PATRICK: No, Your Honor, I don't believe we have Reverend Martin under subpoena. He's been given notice of these proceedings and we understood from counsel that he was going to be here and that counsel was going to put him on.

THE COURT: Wait for the other counsel to return.

MR. WEISS: Your Honor, he's on the way back up. And, again I want to make sure you understand it was not my intent to offend you in any regard.

THE COURT: Sure. He talked to you about leaving. You knew that he had announced him as a witness.

MR. WEISS: He's not listed on the witness list, Your Honor.

THE COURT: He had indicated –

MR. WEISS: I'll be glad to put him on the stand. [p. 287] Your Honor. I thought after no testimony whatsoever, there was need to. If you want me to put him, I'll be delighted to put him on the stand.

MR. D'ALEMBERTE: We'll call him, Your Honor as an adverse witness.

MR. WEISS: I'll be glad to put him on.

MR. D'ALEMBERTE: We could call him as a part of our case. And, I would like to state for the record, before lunch break, I had a conversation with counsel. I indicated we would work it out anyway he wanted to, I wanted to have Mr. Martin's testimony. I would put him on the stand unless he agreed to put him on the stand. Perhaps I misunderstood, because it was my understanding at that time he preferred to put him on the stand.

But, I'm quite happy to call him now as an adverse witness, sir.

MR. WEISS: As am I.

MR. D'ALEMBERTE: I thought we had an agreement. Apparently not.

THE COURT: Please come forward and take the stand.

WHEREUPON:

EDWARD MARTIN

a witness herein, having first been duly sworn, was examined and testified as follows:

[p. 288] DIRECT-EXAMINATION

BY MR. D'ALEMBERTE:

Q Revered Martin, would you please state your name, address, and occupation, sir.

A Yes. It's Edward J. Martin. And, the address is 2000 Northeast Fifty-First Place, Ocala, Florida 34478. Your Honor, I just ran up a flight of stairs. I'm a little winded. Okay.

Q Reverend Martin, if you need more time, we can just ease back. Do you want any water or anything?

A No. I'm fine. I just need a few minutes.

Q All right. Reverend Martin, you are a defendant in this cause?

A Yes, I am.

Q And, you understand you've been under injunctive orders of this court since the time of the preliminary injunction in this cause?

A Yes.

Q And, you were aware of the order entered by the court on September thirtieth of 1992?

A Yes.

Q Did you have some reaction to that order entered on September 30, 1992?

A Not that I know of.

[p. 289] Q Did you – Do you recall having any discussions with the press relating to that injunction of September 30, 1992?

A I don't remember, no.

Q Let me show you, if I may, Plaintiffs' Exhibit F for identification which is an article published in the Orlando Sentinel on October Seventh of 1992. It's been previously shown to counsel.

A Yeah.

MR. WEISS: I've seen it.

A Yes. That's my –

Q Okay. Was your statement quoted in that?

A I don't remember saying that, but if I did, if that's what the reporter wrote.

Q Okay. Would you publish for the court the statement you made, you're quoted as making.

A I don't even remember making a statement.

Q Would you just read for the court what's in there.

A Yes. "I'll go to the front door and save babies lives if I have to even if we have a hundred injunctions against us, Reverend Ed Martin, national executive director of Operation Rescue America."

That's false.

Q And, what is false about that statement?

A First of all, I do not anything to do with Operation Rescue America.

[p. 290] Q All right, sir. I take it that you are, however, involved in directing the work of Rescue America?

A Yes.

Q Okay. And, who is involved with you in that work?

A Where? Rescue America is a national organization. We have a man by the name of Don Tressman (phonetic). We have a man by the name of Gordon Oldhausen (phonetic). Those are the working people in Rescue America.

Q All right. And, is Rescue America an organization with a purpose of playing some role against the abortion – against abortion?

A Yes.

Q And, does Rescue America publish some literature for that movement?

A Yes.

Q And, is that literature drafted by you?

A It's drafted by numerous people.

Q All right. Now, have we identified the people who are actually the leaders of Rescue America?

A Those are the leaders of Rescue America.

Q The ones whose names have been given? You were here when the video tape was being shown.

A Yes, sir.

Q Did you see any of the people who participated in the activities of Rescue America on that video tape?

[p. 291] A No, sir. I didn't.

Q Okay. Now, what is the purpose of Rescue America?

A The purpose of Rescue America is to try to save babies lives at abortion clinics.

Q And, how do you do that?

A Well, the primary thing that I've been doing around the country is engaging churches to come out and hold prayer services in front of abortion clinics. That's my primary function.

Q All right, sir. Is there – Is it an article of faith for the people involved in Rescue America that they will follow God's law and not man's law in this activity?

A Yes.

Q And, is it also a tenent of Rescue America and the leaders of Rescue America that they will – they're willing to break the law in order to fulfill God's law?

A I do not adhere to nor do I push breaking a law.

Q All right, sir. Now, the term "rescue" as used in Rescue America and in the preaching which you, Reverend, do in connection with your activities with Rescue

America, does that refer to blocking the entrance to abortion clinics?

A I feel Rescue is saving babies lives in front of abortion clinics. Rescue is saving babies lives at pregnancy centers. Rescue is savings babies lives at homes for unwed mothers. A rescue is, as was stated before, Proverbs twenty- [p. 292] four, eleven "Rescue those that are being led to their slaughter, to their death."

You know, there are numerous ways of rescuing children from their death.

Q And, is one of those means consist of blocking or blockading access to the entrance of abortion clinics?

A Yes.

Q All right, sir. And, that is actually part of the published doctrine of Rescue America; isn't it?

A It's – The published doctrine of Rescue America has four – four things. We push the first three which is legal picketing. We push sidewalk counseling. We push prayer services. And, on the fourth thing, it's not – it's – that paper that you have there is not the doctrine of Rescue America.

That is what we feel are some of the things we can do to save babies lives.

Q But, one of those is blocking access to the entrance of abortion clinics?

A If people feel like they need to do that, I guess that's what they need to do.

Q All right, sir. Now, the document that I'm holding is identified as Plaintiff's Exhibit P for identification. Let me ask you to look at that and ask if you would publish that?

[p. 293] MR. WEISS: Your Honor, I think it's very relevant we establish the date of this document.

MR. D'ALEMBERTE: I'll be happy to try to do that.

Q When you published it, you published it when, please?

A Yes. We printed this approximately, oh, a year and a half ago, maybe two years ago.

Q All right, sir. And, who authored that, if you will?

A I authored part of it.

Q All right, sir.

A I don't know who authored the other part. I give in to various people, and after I pass it on to other people, then I don't know what happens to it.

Q Okay. But, you do know it's printed though; don't you?

A Excuse me?

Q You printed that document? And –

A I knew it was printed, yes.

Q And, you knew it was printed locally?

A I –

Q In Florida?

A In Florida, yeah.

Q In Ocala?

A I think – I'm not sure where it was printed.

[p. 294] Q All right, sir. But –

A I know it was printed in Florida. But, I don't know exactly where it was printed.

Q Okay. But, it was printed under your direction and authorization?

A Well, yeah. Uh-huh.

Q Okay. Now, on what date was that printed?

A Like I said, it was a year and a half to two years ago.

Q Okay. Now, that was the first publication. Has it been republished since then?

A No. I made a whole – I made other ones. We used to make some with the prayer service schedule on the back of them.

Q Uh-huh.

A Similar to this one.

Q Okay. And, do they contain the same message?

A Yes.

Q And, you have made some with the prayer message contained on the back even into January – I'm sorry – even into the period after the injunction of September 30, 1993 –

MR. WEISS: Your Honor, I object –

MR. D'ALEMBERTE: 1992.

MR. WEISS: The question is vague and ambiguous.

Q No, have you printed –

[p. 295] MR. WEISS: That document.

Q Have you reprinted that document –

A I haven't.

Q – with a prayer service –

A That particular document, exactly what's there I printed about a year and a half ago.

Q That's right. And, now you've referred to documents you print which have the same text, but with the prayer service on the back?

A Yes.

Q Have you done that since September thirtieth of 1992?

A Yeah.

Q You have; haven't you. Here's an example; isn't it?

A Yes.

THE COURT: Would you identify it for the record.

MR. D'ALEMBERTE: It doesn't have a number. I just obtained it, Your Honor. If we can assign it the next number for identification.

THE COURT: The first document, the label on it is what, please?

MR. D'ALEMBERTE: It in initial P, Your Honor.

THE CLERK: This is triple B.

MR. D'ALEMBERTE: Triple B?

THE CLERK: Yes, sir.

[p. 296] MR. WEISS: Your Honor, the document contains no date whatsoever on it.

MR. D'ALEMBERTE: That's right, it doesn't, counsel.

THE COURT: Counsel, was it done after the date of the injunction?

Q The document, Triple B was published after the date of the injunction; was it not, Reverend?

A Yes.

Q And, in fact, it was published sometime probably not too long after the injunction was entered?

A Actually, October, November, December, this document was probably published, it may have been published in September.

Q All right, sir.

MR. WEISS: Of what year.

THE WITNESS: Oh, 1992.

Q And, it was distributed for prayer meetings that went on into December; was it not?

A This document?

Q Yes. Let me see that document that is Triple C now – Triple B, excuse me. It actually has reference to prayer services October thirty-first, November seventh, fourteenth, twnety-one [sic], twenty-eight. Do you know what day of the week those are?

A They're Saturdays.

[p. 297] Q Saturdays. And, why is Saturday picked for the prayer services?

A Why do we pick Saturdays?

Q Yes.

A Because most people are off on Saturday and they can come attend prayer service.

Q Okay. Where – What's the location for the prayer services? Is it in –

A The location would probably be the four – the three abortion clinics that are in Orange County and the one abortion clinic that is in Seminole County.

Q All right, sir. So, this document then was disseminated to support prayer services that were conducted on October thirty-first in Seminole County and on October – November twenty-eighth in Seminole County and December twenty-sixth in Seminole County. If you need to check that, I'll give you a calendar.

A They're all Saturdays, I'm sure of that.

Q And, those prayer services were at the clinics in Seminole County on the dates that I just gave you?

A Yes.

Q All right, sir. And, that material was distributed in connection with those prayer services; was it not?

A It was distributed probably sometime in September. It was not distributed with our newsletter. We distribute [p. 298] them months in advance so we can get people, you know, to come out to the prayer services.

Q But, so long as, I can go find some others, if you want me to, some others were not – There have been others. You continued –

A Yes.

Q And, you continued to distribute this material with prayer service dates on the back?

A I'm not sure if we've done it after that – this one here.

Q I would like to show you one other document. All right, sir. If I can show you one other document. And, this is – Approximately how many of these documents have been distributed that were in the form of Exhibit P or Exhibit Triple B have been distributed?

A I have no idea.

Q Would it be in the thousands?

A I don't know how many were distributed.

Q How many – Can you give us an approximation of how many have been distributed since September thirtieth of 1992?

A I don't know how many were distributed. I distributed maybe to twenty folk. I don't know how many they distributed to.

Q Okay. And, you distributed multiple copies to people asking them to further pass out copies?

[p. 299] A If they wanted to.

Q Now, if you would look at the language on either of these. It's identical on both of these, is it not?

A Yes.

Q Look at the language, if you will, in the third paragraph on the second page. And, if you would, is this the language which you authored?

A I'm not sure if I authored this or not.

Q Okay.

A I don't remember this was – the original content of this was made over two years ago. The only thing that's been changed on this is the back, the prayer services.

Q All right, sir. Let me ask you whether you authored this or participated in the authoring of this language? This language expresses the sentiment that you expected to be conveyed through the distribution of these materials? And, I'm referring to this language quote the word rescue refers to – is it blockading access or blocking access?

A Blocking.

Q "Blocking access to the entrance of abortion clinics in this manner. We are putting our bodies between

the abortionist and his intended victim, the preborn child. While we are in place there are no babies murdered. This buys time for our sidewalk counselors to talk with the birth mothers. In most cases the clinic is shut for the day. Many [p. 300] appointments do not reschedule."

Is that the sentiment of Rescue America and your personal sentiment?

A That's what's written here. I don't believe I wrote that – that entity.

Q All right, sir. But, you did distribute it?

A I gave it to twenty people about.

Q All right, sir. If I may show you what has been marked Exhibit FF for identification and ask if you can recognize that document?

A Yes, I do.

Q And, what is that document, sir?

A That's a document from Rescue America in Houston, Texas that talks about the killing of Dr. Gunn.

Q Was that document issued by Rescue America?

A That was issued by the Houston Office of Rescue America?

Q And, that's an office that's run by Mr. Tressman?

A Yes, it is.

Q He's your colleague in Rescue America?

A Yes. Uh-huh.

Q Did you have any hand in drafting that document?

A Not one bit.

Q Did you have any hand in distributing that document?

A No, I didn't.

[p. 301] Q Was that document distributed in Florida in any way?

A I don't know where it was distributed. No, I have no idea.

Q And, it is your testimony you did not personally distribute that document in Florida?

A I don't. If I – I don't believe I distributed this document. This document was sent out by a fax machine. I personally do not have a fax machine, nor do I – nor have I used one. If I received this and I showed it to somebody, but I did not distribute it to the press or to – as a general distribution.

Q And, the thing that you are certain of, you didn't distribute it in large numbers, at least.

A I don't believe I even distributed it.

Q Okay, sir. But, you do know it was a document originated by Rescue America?

A Yes, it was.

MR. D'ALEMBERTE: Your Honor, I would like to move the exhibits identified previously into evidence. I believe they're Triple B, P and the last exhibit was what?

MS. PATRICK: FF.

MR. D'ALEMBERTE: FF.

MR. WEISS: Your Honor, the only one I would object to is the document – We've got one document that says [p. 302] Rescue America, a post office box a million digits, Houston, Texas.

And, the testimony from this witness is that he's seen it, he didn't author it, and certainly had nothing to do with it, based on his own testimony, with it's origin.

And, so hence to hold my client responsible for what somebody may have disseminated is inappropriate.

MR. D'ALEMBERTE: It was intended to be a Rescue America document. I quite agree with counsel's characterization of the testimony. I think he's quite accurate. It has been conceded by this witness who is a principal in Rescue America, that Rescue America originated this document related to Dr. Gunn.

THE COURT: Counsel, is it your contention that the designated defendant Operation Rescue America is another name for Rescue America?

MR. D'ALEMBERTE: It is, Your Honor. I think even Mr. Cadle, who is far more familiar with these organizations than I, indicated that was probably a typographical error.

The Rescue America, as far as I know is all these people. I don't know of any other Rescue America organization. I'll be happy to ask the witness himself that question.

[p. 303] Q Reverend, is there any organization that you know of that's known as Operation Rescue America?

A No, there's not.

Q Okay. Have you seen references in the press and other places to something called Operation Rescue America?

A Yes, I have.

Q And, do you read that to mean the operation of Rescue America?

A No. If they say Operation Rescue America, I guess that's what they mean. I can't tell you what the press means. There maybe an organization by the name of Operation Rescue America and I'm just not aware of it.

Q But, that you –

A I know there are other organizations that claim to be Rescue America. They may have changed their name to Operation Rescue America. They are anti-abortion groups. I can't tell you what's going on in the various groups.

Q So, as far as you know, there's no operation in Florida, operating in Florida known as Operation Rescue America?

A I don't –

Q The only organization operating in Florida, in this area, so far as you know of a similar type is Rescue America and that's your organization?

A My organization is Rescue America.

[p. 304] MR. D'ALEMBERTE: I hope that's clear, your Honor. We may need to take an amendment to conform with the evidence.

But, I think the evidence is clear not only in this proceeding, but in the prior proceedings.

THE COURT: Again, as to the last exhibit, it's relationship to the Houston office, I'm not quite sure what that is.

Q All right. Is it correct, Reverend, that there are two leaders of this organization, you and Don Tressman?

A That's correct.

Q And, Mr. Tressman operates the Houston office; is that correct?

A Yes. That's correct.

Q And, you operate out of Ocala?

A Yes. That's correct.

Q You have other people working with you, but there are two principals?

A There are other people that are affiliated with Rescue America.

Q Right. But, would it be fair to characterize this as a sort of partnership that you have named –

A Yes, sir.

Q – – named Rescue America?

A Yes, it is.

[p. 305] MR. WEISS: Your Honor, I renew my objection to this document authored out of Houston, Texas by a nonparty to this cause. He didn't participate in its authorship. He didn't know who drafted it, doesn't know how it made its way to the State of Florida.

THE COURT: I think he said by fax. He did say he showed it to at least one other when he received it, if I recall his testimony.

THE WITNESS: Your Honor, I said I may have shown it to somebody. He asked me if I distributed it. I said I might have shown it to somebody else. But, I'm not – I'm not aware of the fact that I showed it to somebody else.

I'm not aware of the fact it was faxed to Florida. I said it was sent out on a fax around the country. I don't know if it came to Florida. I don't know where it went, Your Honor. I wasn't privy to that.

THE COURT: Is Rescue America a legal entity?

THE WITNESS: Yes, it is, Your Honor.

THE COURT: What – what is its nature?

THE WITNESS: It's under a partnership out of Houston, Texas.

THE COURT: Under law, a partnership one partner is responsible for the other partner.

MR. WEISS: Your Honor, if you've got – The extent [p. 306] of this court's jurisdiction and the extent of the order goes just to the borders of Brevard and Seminole Counties. Certainly your order does not bear on what some guy would do in Houston, Texas.

If they want to sue in Houston, Texas for generating it, that's fine. But, my client testified he didn't create it. He didn't disseminate, doesn't know how it got here. He said he didn't even have a fax machine.

To hold against my client, when on its very face it says Houston, Texas is inappropriate.

THE COURT: Counsel, I think he's right.

MR. D'ALEMBERTE: Your Honor, I thought the act of a partner is the act of all partners.

THE COURT: Genereally [sic] under partnership law that's correct. An injunction is personal to this man. And, I don't know that I could find that an unnamed defendant or person not named as a defendant could do something.

The court is going to sustain the objection as to FF, I believe.

MR. D'ALEMBERTE: Thank you, sir.

THE COURT: The others will be received in evidence without objection.

(Whereupon, Plaintiffs' Exhibit Numbers Five was admitted into evidence.)

Q Reverend Martin, to your understanding Rescue [p. 307] America does conduct fund raising drives?

A Yes.

Q And, indeed this material – As I understood it the other two documents were admitted into evidence. The other brochures we've seen that have Rescue America's name, that is actually part of the fund raising material?

A No. This isn't fund raising. This happens to mention how we're – you know, that we're not tax exempt, that we are not for profit.

Q And, the money raised by Rescue America goes to where, sir?

A Goes to where?

Q Yeah.

A It goes to putting out newsletters. It goes to publishing information. It goes to travel expenses.

Q All right, sir. And, that travel includes travel around the country, around Florida, and around the country?

A Around Florida.

Q International travel?

A No. I don't think I've ever used it internationally. Normally, there's always people that, you know, from that area who will buy, will purchase a ticket for us. I'll put it on my credit card, and then they'll reimburse me for my travel expenses.

Q But, you do travel internationally?

[p. 308] A Yes, I do.

Q And, do you also publish a manual, a how to manual?

A No, I don't.

Q Have you indicated in your fund raising brochures that you intend to publish a how to manual?

A I've indicated a lot of things in my brochures. I never made up a how to manual.

Q Have you ever instructed anyone on how to block access to a clinic?

A Where?

Q Anywhere, sir.

A Have I ever instructed anyone on how to, not that –

MR. WEISS: I think the relevent point of inquiry is Seminole and Brevard County. What he may have done in Bismarck, North Dakota has no bearing on the sanctions I think are the focus of this inquiry. He's being held in contempt of what he did in Seminole and Brevard County. The rest is absolutely irrelevant.

MR. D'ALEMBERTE: Your Honor, I'll rephrase the question.

THE COURT: I believe that's a valid objection. It also has to, of course, relate to after September thirtieth.

Q Other than the brochure, which we've already agreed, has been distributed since September 30, 1992, has there been [p. 309] any other instruction about rescue operations or blocking of access to clinics?

A Not that I know of, no, in Melbourne or Brevard County.

MR. WEISS: I'm going to object to the form of the question. There is no instruction in that letter. It's not

instructing a soul to blockade any place. That's a mischaracterization of what that says.

MR. D'ALEMBERTE: I'll be happy to let the document to speak for itself.

MR. WEISS: That quoted portion, as I heard it, that phrase or phrasing that you are relying on, I'll characterize that as advising others how they operate.

The term, that's not instructing anyone to do anything. It's defining the term.

MR. D'ALEMBERTE: Could you read on, counsel? Could you read on, counsel?

MR. WEISS: Oh. "The fourth and most misunderstood aspect of baby saving in front of a clinic is the actual rescue. The term rescue refers to blocking –" typo – "access to the entrance of abortion clinics. In this manner we are putting our bodies between the abortionist and his intended victim, the preborn child. While we're in place there are no babies murdered. This buys time for our sidewalk counselors to talk to the birth mothers. [p. 310] In most cases the clinic is shut for the day. In many cases the clinic shuts for the day. Many appointments do not rescheduled."

That is not instructing anyone to violate this court's order. It's not suggesting to anyone that it is. It is a defining a term.

Q Other than the language in this brochure, has there been any other reference to rescues or the blocking of access to clinics by you since the date of any injunctive order in these proceedings?

A For the two counties mentioned?

Q The two counties mentioned.

A Not that I know of.

MR. D'ALEMBERTE: If I may offer the additional document marked for identification?

My understanding, everything except the one letter with Rescue America was received.

THE COURT: That was not received.

MR. D'ALEMBERTE: And so, FF was not received. The documents referred to earlier should be P and Triple B were received.

THE COURT: That's correct.

THE CLERK: Plaintiffs' P will be number six. Plaintiffs' Triple B will be number seven.

(Whereupon, Plaintiffs' Exhibits Numbers Six and [p. 311] Seven were admitted into evidence.)

Q This is a document, Reverend, now marked Plaintiffs' Exhibit Triple C, Charley. Do you recognize that docuemnt [sic]?

A Yes.

Q And, that's a document published by you, sir?

A Yes. It wasn't published by me, but I wrote that first part.

Q All right. At any rate, you didn't write the whole or supervise the writing of the whole thing?

A No, I didn't.

Q Who participated with you in that document, sir?

A I turned it into Judy Madsen and other people participated in disseminating information. That's all I know.

Q And, that's a document which bears a March 1993 date; does it not?

A Yes.

THE COURT: March?

MR. D'ALEMBERTE: March, 1993, sir.

Q I don't think it has a date on it, but just says March 1993. Am I correct about that, Reverend? March 1993?

A It just says March 1993.

Q All right. Thank you. And, the purpose of that was to see, if it is accurate, that frequently you also work in contact with Randall Terry? You have some connection with Mr. Randall Terry?

[p. 312] A No, I don't.

Q Would you turn inside that document, I understood – perhaps I misunderstood the reference to Randall Terry in there.

A I have no reference to Randall Terry. I didn't approve of having this put into this document. As I said, I write the first part of the document. And, I send it to Judy Madsen and then other people send in information.

This is just a notice, as far as I can tell, about Randall Terry coming to Orlando to speak. But, I had no – I knew Randall was coming. But, he has no connection with, at all, with Rescue America. We're just, as we do with any prolife organization, be it Right to Life or anybody else, if they give us notice of somebody coming in to speak, we like to advertise it for them.

Q Have you also cooperated with the IMPACT training program?

A I personally have to do with the IMPACT training program. I understand that possibly in some of the newsletters – There again, I do the first part of the newsletter and hand it over.

This is an informational newsletter. It includes things from all over the country as people write to us. It informs people in Central Florida of what's going on.

Q And, it's published under whose auspices, sir?

[p. 313] A Under Rescue America.

Q Rescue America. And, that's the organization that's a partnership of you –

A Yes.

Q – in Houston, Texas with Mr. Tressman. All right, sir. And, do you know of other organizations that intend to have demonstrations in Central Florida in the coming weeks?

A No, I don't.

THE COURT: Counsel, this pamplet [sic] that has First Wesleyan and the March sixth date. The clerk

says she first noted it as Plaintiffs' Exhibit D for identification and then it's been placed over and Plaintiffs' Exhibit P for identification, and then received in evidence as six.

MR. D'ALEMBERTE: If we could correct, I don't think we've had an Exhibit P.

MS. PATRICK: That's the incident summaries. The police incident summaries.

MR. D'ALEMBERTE: So, the references throughout this witness' testimony to P should have been Exhibit D.

THE COURT: All right. The record will be corrected.

MR. D'ALEMBERTE: It's now –

THE COURT: Six.

MR. D'ALEMBERTE: And, Your Honor, we would offer [p. 314] into evidence the exhibit just identified, the additional Rescue America document, Plaintiffs' Exhibit Triple C, March, 1993.

THE COURT: Any objection?

MR. WEISS: Just the earlier noted objection, Your Honor, that the document itself, the one without the base reference to an October, 1990 date, predate the entry of this court's injunction by some two years. Now, there's another document –

THE COURT: On Triple C he acknowledges authorship of the first part. It's not clear, counsel, where the first part ends so far as his authorship is concerned.

MR. D'ALEMBERTE: All right, sir. I think it's confusing me to.

THE COURT: It's that document that concerns me at this time.

MR. WEISS: Yes, sir. I've got problems with both of them. One with respect to the date of the document. That's the first one that doesn't have the prayer services on the back. It makes references to an October, 1990 date.

THE COURT: But, there was some testimony it was reprinted afterwards.

MR. WEISS: Not to that document. The one with the prayer services on the back was distributed after [p. 315] October. I think he said it may have been distributed once after that date.

THE COURT: Can you refer me to the identity number, please.

MR. WEISS: Two pieces of blue paper is the quickest way. The first is Exhibit Number Six that says three six, ninety-three in the upper right hand corner.

THE COURT: Okay.

MR. WEISS: That reference to that date is – Nobody in the record has established whose handwriting that was or who put that on there.

MR. D'ALEMBERTE: I think that's correct.

MR. WEISS: I've got a problem with that date and somehow that implies somehow my client, the only

date mentioned, the only date referenced in this printed literature is October, 1990.

MR. D'ALEMBERTE: I think it's November.

MR. WEISS: November, 1990, which predates the entry of your injunction. So, on that basis, I would move that this be stricken from the record. It's not germane.

The only thing on here that references post-dates the injunction is unidentified handwritten notation March 6, 1993.

And, it's not been established that my client disseminated this on March 6, 1993 at First Wesleyan [p. 316] Church. That was the hearsay objection that we got into earlier.

THE COURT: I think he's right, counsel.

MR. D'ALEMBERTE: Your Honor, again, the reason we put them in, both before and after, they indicate they continued to distribute the same literature after the injunctive order. I think the record is clear on that.

THE COURT: I don't think that the injunction – I haven't read the contents of it. The injunction doesn't go to disseimination [sic] of literature.

MR. D'ALEMBERTE: Unless it is in violation of paragraph three. But, I think the record is clear enough and honestly so long, I'm comfortable with the witness' testimony so long as the second document is in evidence and I think it clearly is.

THE COURT: Madam Clerk, I'll strike Exhibit Six. Any more questions of this witness?

MR. D'ALEMBERTE: Your Honor, let me just ask counsel a question.

(Whereupon, an informal discussion was held off the record, after which the following proceedings were had:)

Q I think there was some question just now, Reverend, about the part of the exhibit introduced into evidence.

Madam Clerk, give me the number I'm confused.

THE CLERK: I think that's Triple C.

[p. 317] MR. D'ALEMBERTE: I think that's been accepted into evidence.

THE COURT: No, I think it's been proffered. My notes don't show that I've actually put it in.

MR. D'ALEMBERTE: I would like to offer that into evidence. That's the one –

THE COURT: Again I ask you, he acknowledge that it was published and perhaps distributed by Rescue America. But, he limits his authorship to the first part. Now, I want to know where the first part was.

MR. D'ALEMBERTE: That's what I want to pick up and show him.

THE WITNESS: If I could see it, I'll –

MR. D'ALEMBERTE: Sure.

THE COURT: Show it to him.

Q I believe that there's a cover page on that, Reverend Martin, and a backside that seems to be a letter from you. Is that correct?

A Yes. What was my authorship was the – this letter here in the front, Your Honor, where is says "Love for Life Ed Martin" that was the end of the letter.

The authorship of the "Eulogy for Three Children", the let's see, "Deadline Puerto Rico", over here, and "Dateline Gainesville, Florida," "The Missionary Journies of Rescue America", and right back here in the back where it says [p. 318] last June and August eighteenth, that's all I've put in there.

Q Thank you.

THE COURT: All right, sir. If counsel would hand me that thing, it will be received in evidence as Plaintiffs' Exhibit Number Eight.

(Whereupon, Plaintiffs' Exhibit Number Eight was admitted into evidence.)

MR. D'ALEMBERTE: That's all, Your Honor.

THE COURT: Just to clarify the record, the highlighting in yellow is somebody else's?

MR. D'ALEMBERTE: No, sir. It was done by somebody else. I'm not sure. But, it was not part of the original publication; is tht [sic] right?

THE WITNESS: That's right.

MR. D'ALEMBERTE: And, if there is any writing on that, it was just in the way it came.

THE WITNESS: Evidently whoever picked that brochure up wrote on it. We don't write on it.

THE COURT: All right.

MR. D'ALEMBERTE: There maybe some on the front page too, Your Honor, in handwriting. If there is, that is extraneous to it.

THE COURT: Cross-examination?

CROSS-EXAMINATION

[P. 319] BY MR. WEISS:

Q Mr. Martin, let me show you Plaintiffs' Exhibit Number Seven, do you - did you, yourself, circulate Plaintiffs' Number Seven after October, 1992?

A No. I think it was made up and distributed in September, the early part of September.

Q Excuse me. This is a very critical question. I want to -

THE COURT: I'm trying to get the exhibits sorted out.

MR. WEISS: I understand.

Q The question was --

THE COURT: Ask it again, please.

Q Did you, this Exhibit Number Seven, has a date on the back of it, the first date entered is October thirty-one. Okay. Did you distribute this literature prior to October, 1991 - 1992, I'm sorry. I apologize. October, 1992?

A Normally we print them about two months ahead of time to get them out so people can see where the prayer services are. This thing is usually done a couple of

months because because it's just something, you know, it's distributed when people go out. It's printed up before, I would say probably in September sometime and distributed that time so people would know when to come out to the prayer services.

[p. 320] Q So, you wouldn't distribute it after - the judge's order, I think is October thirty-first, 1992. The first prayer service referenced is October 31, so this publication would have been several months prior to this entry of this court's injunction?

A Oh, yes. That's correct.

Q Now, in this Plaintiffs' Exhibit Seven, have you instructed anyone to blockade any clinic located in Brevard or Seminole County?

A In that brochure, it never at any time have I ever asked anybody to do anything in blockading clinics.

Q Now, on the back it says "prayer service". Let's talk about what you do at these prayer services.

A What we try to do is get the pastors in the churches involved. And, what we do, we go to the abortion clinics and try to stay in the most neutral spot as we possibly can, usually off to a corner somewhere, under a tree, clearly away from the door. And, you know, maybe sometimes we have ten people. Sometimes we have twenty.

And, we use a prayer service, starting with, we sing God Bless America. And, then we recite the Book of Psalms, responsive readings. And, each individual person as it goes in the prayer circle will pray. In the end I give

the pastor's benediction. And, usually it takes about an hour and a half, an hour and forty-five minutes.

[p. 321] People kind of hang around and chit-chat for a while, and they go home or they go out and get something to eat.

Q Now, there have been pastors from Orange County and Seminole County that have gotten down on their hands, gotten down on their knees and prayed in front of these abortion clinics; correct?

A Oh, yes. Uh-huh.

Q Now, is anything other than prayer taking place?

A Now, I'm strictly involved in the prayer services. At the prayer service that's all we do is pray.

Q Now, –

A And, sing.

Q Now, did I read to you and provide you a copy of the judge's injunction, both temporary and current, and have you read those prior to today?

A Yes, I have.

Q Does that injunction specifically provide you your constitutional right to pray?

A Yes, it does.

Q Did you avail yourself of the rights under the injunction, the rights under the First Amendment of the United States Constitution?

A Yes, I did.

Q Did you, at any time, trespass on, sit in, block, [p. 322] obstruct ingress into or egress from any facility at which abortions are performed in Brevard and Seminole County, Florida?

A No.

Q Did you, at any time, physically abuse any person entering, leaving, working or using any services of any facility at which abortions are performed in Brevard or Seminole County Florida?

A No.

Q Did you attempt or direct any other human being on the face of this earth to take any of the actions I just described above?

A No, I didn't.

Q Did you restrict yourself to peaceable prayer in front of clinics in Orange County, Florida?

A Orange and Seminole. In fact, Mr. Weiss, we no longer have a prayer service in Seminole County. We have prayer services in Orange County.

Q And, the reason you don't have prayer services in Seminole County is because not enough people were showing up; right?

A Nobody was praying.

Q Now, you remember Mr. Snydle saying you blocked his access or he said you stood in front of his car?

A I remember that he said that.

[p. 323] Q Did you ever stand in front of Mr. Snydle's car in Seminole or Brevard County, Florida?

A No, I haven't. I've never even seen Dr. Syndle in either county.

Q Have you threatened any employee of any abortuary in Seminole or Brevard County?

A No. No. Not one person.

Q Are you an officer or member of any organization known as Operation Rescue?

A No. I've never been a member of Operation Rescue.

Q Have you ever been a member or officer in any organization known as Goliath or Operation Goliath?

A No, I have not.

Q Have you ever been an officer or member of any organization known as Operation Rescue Amercia [sic]?

A No, I haven't.

Q Have you ever been an officer or member of any organization known as Operation Rescue America National?

A No, I haven't.

Q Have you ever been an officer –

THE COURT: Wait just a minute. He previously testified that Number Eight was published by Rescue America.

MR. WEISS: I asked Rescue America National. The one that Mr. Cadle has has national on the back of it. I [p. 324] wanted to make sure, we're talking about this

impact stuff was put on by, something that has the word national associated with it.

THE COURT: All right.

A Have you been an officer or member of any organization charged with the responsibility of training anybody associated with IMPACT training program?

A No.

Q Have you been in Brevard County in the last two and a half years?

A Yes. I was in Brevard County a year and a half ago at a prayer service that was conducted on A One A in front of a hotel.

Q Was that within the driveway of any abortion clinic?

A I believe it was in Cocoa, if I'm not mistaken. It was a hotel. It wasn't – it was probably twenty-five miles from the Aware Woman Clinic, I would estimate. I haven't been to the Aware Woman Clinic in probably two and half years, three years.

Q Now, Plaintiffs' Exhibit Seven, that references a prayer service on October thirty-one, did you disseminate that document attempting in any way to intentionally defy the order of Judge McGregor?

A No, I didn't. I wouldn't do that.

Q Have you at all times respected Judge McGregor's [p. 325] order in every respect?

A Yes.

Q Now, again with respect again to the publication of Exhibit Number Seven, that publication was several months prior to the entry of this judge's order; is that correct?

A Yes, it is.

MR. WEISS: Nothing further, Your Honor.

REDIRECT-EXAMINATION

BY MR. D'ALEMBERTE:

Q And, Reverend Martin, giving your last answer, you're not recanting your the testimony you gave to earlier that document was published several months prior, was actually distributed after the date of the injunctive order September 30, 1992? You are not recanting that testimony; are you?

A I didn't understand the question.

Q Didn't you tell me in your direct testimony there were copies of that document distributed after September 30, 1992?

A After September thirtieth?

Q Yes.

A If I did, after I looked at it, after I did, I don't know when this thing – I distributed this to people two months in advance. I don't know what they do with it after.

Q You might distribute it two months in advance, but [p. 326] the people have that long a memory that you're going to get that document out two months in

advance that that's going to come out sometime in August?

A Well, hopefully they hang on to it. I don't know what they do with it. I don't remember the testimony.

Q Well, again Reverend Martin, let's be clear. You continued to distribute that material on in to December of 1992?

A Did I personally?

Q Yeah.

A I didn't – not that I know of.

Q Yes, sir. I'm saying you personally.

A I don't believe I did.

Q Uh-huh. Do you recall being in Seminole County on the evening of December fourth of 1992 and distributing that material?

MR. WEISS: That material being exhibit Number Seven?

MR. D'ALEMBERTE: Yes.

A I don't know.

Q Is that possible, reverend?

A Anything is possible.

Q The fact of the matter is, you didn't print up additional material to let people know about these other prayer meetings; did you? You had this material printed up to [p. 327] handle that quarter's prayer meetings and you continued to give notice to people.

A Usually I give it all out to people at one time.

Q But, you – So, it's with the intention that it continues to be distributed while it's pertinent and it's pertient [sic] while the demonstrations are going on.

A I hope people keep it and go to the prayer meetings.

Q All right. And, you also hope that the other material gets distributed if it has not been distributed? Isn't that the purpose of it?

A Hopefully it gets distributed before the prayer services start.

Q And, the last prayer service on that is what?

A December twenty-sixth.

Q All right, sir. Now, just one final series. Did I understand just a moment ago you respected the judge's order?

A I've never broke the judge's order. I respect the judge.

Q Have you ever indicated that you would follow injunctive orders if they are contrary to God's word?

A If they're contrary to God's word, I don't feel that the judge's orders is contrary to God's word.

Q And, statements made just after this injunctive order being entered, do you agree that you did make statements that you would follow any injunction if it was contrary to [p. 328] God's word?

A I said I had no knowledge of what the Orlando Sentinel wrote.

MR. D'ALEMBERTE: All right. Thank you.

RECROSS-EXAMINATION

BY MR. WEISS:

Q Now, Mr. D'Alemberte wants to talk about the last day on this document which is December twenty-sixth. Let's talk about the first day. I want to make sure we've got this. The first day you published this several months – This covers October, November, December. I want to make sure the record is crystal clear. You published this document several months prior to October 31, 1992.

THE COURT: Counsel, he hasn't testified it was several. That's your version.

MR. WEISS: A couple.

THE COURT: A month in advance.

MR. WEISS: A couple of months.

THE COURT: Okay.

MR. WEISS: Several and couple. I apologize, Judge. My enthusiasm in trying to put the distance between him and the time, I apologize.

Q Now, anywhere in the judge's order did you see any instructions whatsoever prohibiting you from sending out your [p. 329] leaflet describing operations of Rescue America? Did you understand the judge to say

you can't publish that leaflet, that you had lost your First Amendment rights to do that?

A No, I don't.

MR. WEISS: Nothing further.

MR. D'ALEMBERTE: May I, Your Honor?

REDIRECT-EXAMINATION

BY MR. D''ALEMBERTE:

Q Reverend Martin, did you understand that people reading this document that's published by you would understand that it was proper to put their bodies in the place of clinics to block to the clinics? Did you understand that was a reasonable reading of this document?

MR. WEISS: Your Honor, objection –

A No.

MR. WEISS: That calls for the wildest form of speculation how someone might interpret the document.

THE COURT: Well, I think you can inquire as to intent.

MR. D'ALEMBERTE: Thank you, You [sic] Honor.

THE COURT: Because he's the author.

Q All right. Now, when you say the term rescue refers to blocking access to the entrance of abortion clinics, did you intend that to be the definition of the word rescue? [p. 330] People understand that?

A I don't believe I wrote that section, no.

Q But, you distributed it. Did you understand that the intention of people –

A I wrote this as a document to explain to people various ways of saving babies lives at abortion clinics.

Q And, one of those ways is rescue; is it not?

A If that's what they want to do.

Q And, rescue means blocking access?

A Oh, I believe rescue, like I said, I believe that rescue means a lot of things. Okay. In this terminology – it's a – I'm not sure if I wrote that or not. I didn't do a final count on it. I mean, it does have my name on it. But, rescue is numerous things.

Q And, it involves, when you use a rescue you certainly can mean blocking access?

A Yes.

Q And, let me go on. The words are "in this manner we are putting our bodies between the abortionist and his intended victim, the preborn child." Do you recall whether you wrote those words?

A There's a lot in here I didn't write.

Q Do you recall if you wrote those words, sir?

A I don't know if I wrote them or not.

Q To whom does the we refer, "we are putting our [p. 331] bodies between the abortionist and the intended victim"?

A Whoever wrote this – and I'm not sure I wrote this, but whoever wrote this and people who feel like they want to do it.

Q All right, sir. And, the next sentence is "While we are in place –" is that an exortation for people to be in place so that there are no babies murdered?

A This is just an explanation of what happens when people blockade a door.

Q And, it's not intended –

A It's not intended – it was never intended to ask anybody to do anything.

Q All right, sir.

A It was just an informational piece that was put out.

Q And, this informational piece, do you understand it's intention was to buy time for sidewalk counselors to talk with the birth mothers? Is that your intention?

A This informational piece's intention is to buy time.

Q And, was that your intention in distributing this piece?

A No. My intention was to inform people of the options that they have.

Q All right, sir. And, is one of those options shutting the clinic for the day?

A Excuse me?

[p. 332] MR. WEISS: Objection, Your Honor, at this time it's really accumulative.

THE COURT: Overruled.

A As I said, this is an informational piece.

Q I understand. Is one of those options shutting the clinic for the day?

A Excuse me?

Q Is one of those options shutting the clinic for the day?

A That's not what it says, no.

Q Okay. When the words are "In most cases the clinic is shut for the day" –

A But, that's not the objective. That's just a statement. That's a statement of fact.

Q And, that's a statement of fact about that option of blocking a clinic?

A If people so desire to do that.

Q And, is one of those consequences of taking that action that many people who have appointments will be discouraged and not return?

A If – Yes.

MR. D'ALEMBERTE: Thank you. That's all, sir.

MR. WEISS: Nothing further.

THE COURT: Thank you, sir. If you would step down and return to your seat.

[p. 333] MR. WEISS: Your Honor, at this time now, we may he permitted to leave to go to his family emergency? He does have a family emergency? If they have no further questions, he'd like to leave. Is that all right?

MR. D'ALEMBERTE: Sure.

THE COURT: Okay. Thank you.

MR. D'ALEMBERTE: That's all we have, Your Honor.

THE COURT: Plaintiffs rest?

MR. D'ALEMBERTE: Yes, sir.

THE COURT: Tell this court what your case consists of, please, so far as testimony.

MR. WEISS: With respect to, I believe there's been a stipulation that Mrs. Madsen has not violated any of the court's injunction whatsoever. If I've got that clear then –

THE COURT: That's my understanding.

MR. WEISS: With respect to the actions brought with respect to Mr. Martin, that's the only thing we're talking about.

I would move that at this time the charges of violation of this court's order as alleged in their motion number one should be dropped and that we should be

permitted to the charge in your permanent injunction, I'm quoting from page two of their motion number one.

"The permanent injunction, the court enjoined the [p. 334] defendants from the following: trespassing on." Not one word. As a matter of fact, they got irritated when I started cross-examining about may have happened. Not one word did he trespass. Not word one that he sat in, blocked or obstructed any ingress to or egress from any facility. There's not one shred of evidence that he did any of that.

There's not any shred of evidence that he physically abused a single person from entering, leaving, working or using any of the service that facility.

And, there's not a shred of evidence that he attempted or directed others to take any of those steps whatsoever.

You have him saying the first prayer – Your order is October thirty-one. The first prayer service is October thirty-one. He said to get folks down, I'm going to use the right term, a couple of months prior he published that.

He said he understood your order. He respected your order and that it was in compliance with God. I don't know what difference that makes. But, he said he felt it complied with God's law. And, he certainly didn't feel under any compulsion to violate it. His testimony that it comports with God's law.

And, without any further showing whatsoever, other [p. 335] than sending out a leaflet, publishing a

leaflet at least a couple of months prior to your order which is not a prohibited event under your order. I think –

THE COURT: It depends on what the leaflet says.

MR. WEISS: Yes, Your Honor. I agree.

THE COURT: Directing others to do things.

MR. WEISS: Your Honor, if you'll read and review that order, if he did that, he said he published it several – a couple of months prior to your order, then he can't be held in contempt for doing it. That's not a prohibited act under the injunction.

It doesn't instruct anyone to – it doesn't attempt or direct anyone to take any action. It doesn't say trespass. It doesn't go sit in. I want you to go block. I want you to obstruct access to. And, it specifically makes no reference whatsoever to blocking access to any facility in Brevard or Seminole County.

And, the evidence is completely clear here, Your Honor, that there was no blocking. But, I expected when we were coming forth with sanctions, that these folks were arm in arm and they had the chains around them like the classic protest that Mrs. – I don't know, the lady did the video, I'm sorry. I've forgotten her name. She said that's a classic protest with these folks thumbing their nose at the court. That would suffice to [p. 336] constitute a violation.

But, we don't evidence of a single arrest for trespass, a single arrest for abuse, and certainly none by my clients.

And, on that grounds alone, Your Honor, I don't think that there has been any showing whatsoever of any violation.

All my client's done whatsoever, he has exercised his rights, which you provided him along with the United States Constitution. He can pray. And, he said he did so. There is nothing wrong with praying.

And, based on the evidence that's before the court, I don't see how there's any factual predicate to find Judy Madsen, Ed Martin in violation of your order. They've got to intentionally violate your order. And, I don't believe there's been any showing, Your Honor.

I'm surprised that they brought this action, sincerely. I mean if they were arm in arm, thumbing their nose at you saying a thousand people they shut down the clinic. That didn't happen.

Your order has been complied – Secondarily, they're saying let's amend it. I think your order has been pretty darn well respected since nobody's been arrested for violating any of it. There hasn't been a single arrest.

[p. 337] So, I based on that –

THE COURT: I have a little trouble equating police action to whether my order has been violated. It doesn't take a police arrest to show that there has been a violation of the order. That's not the sole determinative for that particular issue.

MR. WEISS: Your Honor, I don't think there's been any evidence whatsoever my clients engage in anything other than their fully protected First Amendment rights.

And, I think the efforts of my clients to peaceably assemble and pray are protected by the constitution and your order. And, I think they haven't made a case against them, Judge.

THE COURT: All right. Next motion. Mr. Cadle, do you wish to make a similar motion?

MR. CADLE: Your Honor, I have two very brief witnesses prepared for my defense. I believe they counteract some of the testimony from yesterday. Based on today's testimony, I could in a horde of other witnesses that could counteract much of what has been said today before the court.

That's not my desire. But, I do have two witnesses present. Four or five questions to each witness is what I have to present.

THE COURT: Counsel, do you wish to respond to his [p. 338] motion?

MR. D'ALEMBERTE: Yes, Your Honor, just very briefly, if I may. As I understand, counsel makes three points.

One, he refers to the failure to have arrests. Actually, if you listen to counsel closely, I actually hear him arguing both sides of that. Perhaps I'm guilty of that as well.

The fact there are no arrests, I respectfully submit, does not control whether or not the court's injunctive order should be entered. Indeed, in papers previously filed with the court, counsel says where the criminal law is there and capable of being enforced, you don't issue injunctive orders. I think we're well past that step.

As I understand it, speaking directly to Reverend Martin, Your Honor, counsel is simply incorrect when he says there's not a shred of evidence. It maybe all of this rests within the court's determination as to whether or not it's convincing evidence or not. But, there certainly is a shred of evidence on both the points.

The first evidence, of course, comes from the doctor whos [sic] testified that, indeed it was Reverend Martin, that Reverend Martin was one of the people blocking the car.

This is diametrically opposed to testimony. And, [p. 339] what we have in that case is just have to select between the testimony and that, Your Honor, would have to weight the credibility of both the doctor and the Reverend Martin.

As to the brochure, Your Honor, it's really interesting to me the words used in the brochure originally published, I think the record indicates before the September thirtieth order, but an order actually siged [sic] by Your Honor, a temporary injunction was in place.

The word was in both these orders blocking. The first phrase was trespass, sitting in, blocking or impeding or obstructing access, ingress or egress of facilities.

And, then in paragraph three, attempting or directing others to take any of the above actions described. And, so again, there is, I confess some lack of clarity in the record in this respect.

When Reverend Martin originally testified he told us that the brochure was published and he actually distributed copies of it after the order was entered. On

cross-examination he seemed to adopt a suggestion by counsel that perhaps this had been published two months before and he couldn't – he got a little fuzzy about when it was distributed.

When I asked him specific questions about specific [p. 340] locations, he did concede, I believe, on my redirect-examination it was possible that, indeed, he distributed the literature on December fourth, 1992, but he wasn't positive.

And, so although there's not clarity on all that, we respectfully submit that the witness' credibility is something Your Honor has to take into account as well.

As to the great respect that the witness has to the orders of the court, again that's a matter on which there is some dispute. It was, as I understood the testimony from the witness, he did not recall making particular statements to an Orlando Sentinel journalist relating to the fact that he would follow God's law rather than man's law and you could have a hundreds injunctions, were the words quoted, and it wouldn't make any difference, he would go to the doorsteps to save children.

Now, he doesn't deny saying those words. He just does not, as I recall the testimony, does not recall saying those words to the jonunalist [sic].

So, all these questions, counsel says there's not a shred of evidence, I do concede there is some confusion what the real truth is here. But, there certainly is plenty of shreds of evidence, enough evidence to allow Your Honor to direct Reverend Martin to comply with the court's order.

[p. 341] MR. WEISS: Your Honor, because of the time constraints, I apologize. I've never furnished a trial court a copy of an appellate brief. And, I have briefed this thoroughly in a Fifth District Court of Appeals.

Because we ran into our night last night and Mr. D'Alemberte met trying to go some of these exhibits. I didn't have an opportunity to change the style of this around so it's got the circuit court and addressing it to you.

But, it does address the fundamental First Amendment Constitutionals rights that my clients have. If you would permit me, counsel, I believe has a copy of this appellate brief. Because it thoroughly briefs the law in this area and exactly what my clients rights are under the –

THE COURT: Right now it's a factual determination rather than a determination of law whether or not the words of the injunction have been violated by the acts as revealed by the evidence before the court not what their rights are.

THE COURT: I'm sure that will be helpful back at the time of the imposition of the injunction. This may help counsel, if there is no objection to giving your document that is almost word for word with a document that is already in the court file, a premliminary [sic] brief, [p. 342] I believe, that Mr. Weiss drafted for the trial court that is already in the court file.

MR. WEISS: I did it before the Fifth, I apologize.

MR. D'ALEMBERTE: Are there significant differences?

THE COURT: Well, I don't know. Does it deal with the concept of what is blocking?

MR. WEISS: Your Honor, it deals with the concept associated with the First Amendment protected activities.

MR. D'ALEMBERTE: Your Honor, I think Mr. Weiss would agree there is nothing relating to the topic of blocking or the factual determination what is blocking or urging people to block. I don't think there is anything in that brief relating to that.

THE COURT: Well, counsel, it's twenty-one minutes to six. Mr. Cadle said he has a couple of witnesses. Because of other commitments tomorrow that I continued on to tomorrow morning, I've asked my secretary to search, you know, the next time available. And, the next time is a week from Friday. It's the last day of a trial week with a case scheduled for that time that probably will not go.

My thought is that perhaps since there was a reference to some activity scheduled for Good Friday and perhaps Easter, and it may serve the situation well if I consider motion two a week from Friday.

[p. 343] MR. D'ALEMBERTE: Thank you, Your Honor.

THE COURT: And, with enough time to prepare for the second motion. At that time I'll hear Mr. Cadle's witnesses and make a determination so far as motion one is concerned.

MR. D'ALEMBERTE: Thank you, Your Honor.

MR. WEISS: Yes, Your Honor, and I apologize. I've never done that before.

THE COURT: The court will be in recess.

(Whereupon, the foregoing proceedings were recessed at 5:45 o'clock p. m.)

CERTIFICATE OF REPORTER

STATE OF FLORIDA :
: ss.
COUNTY OF ORANGE :

I, Margie L. Breit, Notary Public for the State of Florida at Large, do hereby certify that the foregoing proceedings were reduced to shorthand in the presence of the within-named parties and later transcribed; that the foregoing is a true and correct transcription of the excerpt of the proceedings as aforesaid.

I do further certify that this hearing was taken at the time and place in the foregoing caption specified and was completed without adjournment.

I do further certify that I am not a relative, counsel, or attorney for either party or otherwise interested in the event of this action.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my seal of office on April 1, 1993, in Orlando, Florida.

/s/ Margie L. Breit
MARGIE L. BREIT

My Commission Expires:
October 7, 1994
Commission No: CC 053127

[SEAL]

[p. 1] IN THE CIRCUIT COURT OF THE EIGHTEENTH JUDICIAL CIRCUIT IN AND FOR SEMINOLE COUNTY, FLORIDA

WOMEN'S HEALTH CENTER, INC., AWARE WOMAN CENTER FOR CHOICE, INC., EPOC CLINIC, INC., AND CENTRAL FLORIDA WOMEN'S HEALTH ORGANIZATION, INC., Petitioners,	]	CASE NO. 91-2811-CA
vs.	]	
OPERATION RESCUE, OPERATION RESCUE AMERICA, OPERATION GOLIATH, ED MARTIN, BRUCE CADLE, PAT MAHONEY, RANDALL TERRY, JUDY MADSEN, AND SHIRLEY HOBBS, Respondents.	]	

BEFORE THE HONORABLE

ROBERT B. MCGREGOR

JUDGE OF THE COURT

A hearing in the above style cause was held at 1:30 o'clock p. m., on Friday, the 2nd day of April, 1993, in the Courtroom of the Seminole County Courthouse, Sanford, Florida, before Margie L. Breit, Notary Public for the State of Florida at Large.

[p. 2] APPEARANCES:

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HEARING HELD APRIL 2, 1993

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[p. 3] WHEREUPON:

The following proceedings were had:

RAYMOND UNTERBERGER

a witness herein, having first been sworn, was examined and testified as follows:

CROSS-EXAMINATION

BY MR. D'ALEMBERTE

Q Mr. Unterberger –

A Unterberger.

Q My name is D'Alemberte. Mr. Unterberger, I represent the Plaintiffs in this cause.

Mr. Unterberger, you've indicated that you were arrested one time just prior to the time that one of these pictures was taken. Can you tell us now how many times you've been arrested in –

MR. WEISS: Your Honor –

Q – in the course of making demonstrations at – Let me finish my question. – in the course of making demonstrations at abortion clinics?

MR. CADLE: Your Honor, I object. This is not related to the time frame within this Court's order. It's not relevant. It's not material.

THE COURT: Sustain the objection. Improper [p. 4] impeachment.

MR. D'ALEMBERTE: Your Honor, I'll try to get at it another way.

Q Have you participated in activities – First of all, are you a member of the IMPACT Team?

A No.

Q Do you belong to any organizations or do you support organizations that are opposed to abortions?

A I am against abortions. I do not support organizations as such.

Q I'm sorry?

A I do not belong to organizations.

Q All right. Have you cooperated with the IMPACT Team?

A Yes. I have cooperated with them.

Q Have you attended meetings of the IMPACT Team?

A No.

Q Educational programs of the IMPACT Team; have you attended any of those?

A No.

Q Who is the leader of the IMPACT Team in the Melbourne area?

A The IMPACT Team?

Q Uh-huh.

MR. CADLE: Your Honor, again I object. He just [p. 5] said he's never been to a meeting. He's never been in the classroom.

THE COURT: He might have knowledge from other sources.

A The only source I have is on the street. And, I've never personally seen anybody be asked to do anything on the street as far as the IMPACT Teams are concerned.

Q Well, when you've gone to the Woman Aware Clinic, you've gone there in coordination with other people; have you not?

A Generally I go by myself or with my family. I drive my car up there. At rallies they announce the time and I go.

Q Is it your testimony then, sir, that you've not had any coordination or communication with Mr. Cadle concerning activities at the Aware Woman Clinic?

A Concerning activities at the Aware Woman's Clinic?

Q Sure.

A At any time of the injunction, no.

Q You've had no discussion with him about activities there?

A Sure.

Q During the time of the injunction.

A Bruce is a friend. I have had discussions with him about all kinds of things since. I'm sure we've talked about Aware Woman. I'm sure of that.

[p. 6] Q You've indicated in your earlier testimony that you have, indeed, had some activities with the IMPACT Team. What are those activities?

A I've been at Aware Woman on Saturday morning.

Q When the IMPACT Team is there?

A Yes.

Q And, what is your understanding about who has organized and recruited the IMPACT Team?

A I don't know. I don't know who recruited the IMPACT Team. I have no idea. I have seen fliers on it, the purple fliers.

Q Have you seen the flier that I now show you which is marked as Plaintiffs' Exhibit Triple E, echo, Your Honor? The date on that, I think, is March 27, 1993.

A I have not seen it.

Q Any of that literature?

A It came to my house. I haven't seen it though.

Q It has come to your house?

A Yes, it has.

Q And, it has come to your house since – since March 27, 1993?

A Yes, sir.

Q Is that correct?

A Yes.

Q And, how is it you happen to know it's come to your [p. 7] house and you haven't seen it?

A Well, I recognize the flier here, you know. I just glanced over it.

Q All right. And, then, is it fair to say you are on the mailing list for the IMPACT Team's mailing?

A I got it in the mail.

Q All right, sir. Who, then based on – Have you received earlier mailings from this IMPACT Team?

A From IMPACT Teams? I get Operation Rescue National's.

Q All right, sir. And, you are indicating Operation Rescue National is on that letterhead along with IMPACT; is that correct?

A That's correct.

Q Okay. Now, have you seen that literature distributed anywhere?

A No, I have not.

Q Now, I'd like for you to answer the next series of questions dealing with the period since the entry of the permanent injunction order in September 30, 1992.

Is it – Have you participated in any of the following activities: Sidewalk counseling?

A Yes.

Q And, that's at Aware Woman Clinic in Melbourne, Florida?

[p. 8] A Yes, it is.

Q Shouting at the surgery?

A Shouting at the surgery?

Q The surgical facilities at Aware Woman Clinic?

A No. I have not.

Q All right, sir. Have you been involved in any kind of shouting at that clinic?

A I have called out to the abortionist.

Q Called out what, sir?

A I have – I have – I guess you could call it shouting, but it's in order to be heard in a distance without trespassing. I have called out to the abortionist.

Q And, what have you called out, sir?

A I have called out that God will hold him accountable for the blood that is shed in that place that day. That's generally this gist of that.

Q All right, sir. And, you've continued to do that each Saturday?

A I don't do that every Saturday, no.

Q All right, sir. Have you done it any Saturdays in March, sir?

A No, I have not.

Q Okay. Now, have you participated in any residential picketing?

A Yes, I have.

[p. 9] Q And, whose homes have you been involved in residential picketing?

MR. CADLE: Your Honor, I object. This is outside the scope of direct.

MR. D'ALEMBERTE: Your Honor, my understanding of the inquiry that was made by Mr. Cadle, was

he was making inquiry about both as to Motions One and Two. And, I though he expressly declared that to the Court.

And, it's my understanding that these activities where were – I can set a further predicate.

THE COURT: That's fine. Overrule the objection.

Q Now, have you participated in any residential picketing in company with the IMPACT Team?

A Yes, I have.

Q All right, sir. And, again, the IMPACT Team is the Operation Rescue National operation?

A It's on the same letterhead as far as that goes.

Q And, you know that Bruce Cadle is the Southeastern Regional director of Operation Rescue National; do you not?

A Yeah.

Q And, your answer is yes?

A Yes.

Q Now, whose homes have you picketed?

A With the IMPACT Team?

Q Yes.

[p. 10] A I believe it was – well, that wasn't even – That was not in Brevard or Seminole County.

Q Were there people who were working at the Woman's Aware Clinic in Brevard County that you picketed?

Have you picketed the homes of people who were working at Aware Woman's Clinic?

A Yes, I have.

Q All right, sir. What people have you picketed?

A Not with the IMPACT Team, but we've picketed Pam Doyle.

THE COURT: Say that name again.

THE WITNESS: Doyle.

Q That's Pam Doyle who is a nurse at Aware Woman's Clinic?

A I don't know. I believe so. I'm not sure.

Q All right, sir. So, how did you find out where Pam Doyle lived?

A I looked her name up in the phone book and went over and drove through the complex.

Q All right, sir. And, what other people have you engaged in residential picketing?

MR. WEISS: I'm going to interpose an objection unless it's restricted to post permanent injunction.

MR. D'ALEMBERTE: All my questions were directed to that counsel. I made that as a predicate to this series [p. 11] of questions.

MR. WEISS: This is not –

MR. D'ALEMBERTE: The witness understands.

A This is without – That was without the IMPACT Team.

Q That one was without the IMPACT Team. All right, sir. Other residential picketing that you've participated in.

A I believe it was Windle's home. It was the same day that we did Pam Doyle's home.

Q All right, sir. That wasn't the only one that day; was it? Wasn't there a third?

A There was a third one.

Q All right, sir. Who was that?

A I don't remember right off. Give me a few minutes and I'll give it to you.

Q All right, sir. Where did you first learn about residential picketing? Who did you learn it from?

A I heard about it from a group called Operation Life in Dobbs Ferry, New York.

Q All right, sir. Now, you were giving us a list of people who you participated in residential picketing targeted toward them. Who else?

A Just that third one that day. I don't recall any others.

Q All right, sir. Now, does residential picketing include not only holding up signs and marching in the [p. 12] neighborhood, but going up to the door of the residence?

A Not while I was there. Oh – Yeah. It would include knocking on the door.

Q All right, sir.

A I've never done that and I've never seen it done.

Q Okay. Does – Have you seen residential picketing done which means also carrying fliers around to neighbors?

A Yes, sir.

Q And, have you done that?

A I have never handed out the fliers, but I've seen it done.

Q And, you've been there while it's been done?

A Yes, sir. I have seen that.

Q And, it involves signs carrying the target's name and carrying around the neighborhood signs bearing their names?

A Yes, it – Yes.

Q And, identifying that person as a murderer?

A As a murderer?

Q A baby killer?

A Sure.

Q Okay. Now, have you participated in a hotel – any demonstration at a hotel where a doctor was staying?

A Since September thirtieth, no, I have not.

Q Okay. But, now – Okay. Now, do you know, if I [p. 13] refer to phone line tie up or phone line bingo, do you understand that terminology?

A No.

Q Have you ever heard it?

A Have not.

Q Have you ever heard of any use of techiqes [sic] which would be designed to tie up the telephones of the clinic? Have you ever heard of that being done?

A I've seen a flier called the Eight Hundred Club.

Q All right, sir. Who published that?

A I have no idea.

Q Okay. Have you participated in any of those activities?

A No.

Q Have you ever known of any participation by any IMPACT Team members?

A No.

Q Or Rescue America members?

A No.

Q Okay. Now, you – you've been at the Aware Woman's Clinic again since September 30, 1992 and you've seen some occasions when there have been ladders put up right by the fence; have you not?

A Yes.

Q Is it fair to say, Mr. Unterberger, that, indeed, [p. 14] those ladders were – appeared at the clinic through some process of which you have direct knowledge?

A I brought one ladder.

Q All right, sir. You brought your truck there and brought a ladder; didn't you?

A No. I brought my car.

Q All right, sir. What was the purpose of the ladder?

A The ladder was to see over the back fence.

Q And, was it just to see over the back fence?

A No sir. Also to discuss with the people there what was going on.

Q Give us a little bit of idea about how these discussions were carried out.

A I never – I have only confronted the doctor, the abortionist. I have never discussed with other – with the employees over the back fence.

Q All right. But, you have been there while it's been done; haven't you?

A Yes.

Q And, you brought a ladder for that?

A Yes.

Q All right, sir. And, would you tell us how these discussions take place? What was said in these discussions.

A Somebody would say that – Let's see, "Are you aware what's going on in there. They're ripping babies apart. [p. 15] You're a part of that. God loves you."

Q Have you heard names called?

A Names called?

Q People's names?

A I'm talking about the back fence.

Q Yes, sir.

A I'm not talking –

Q No.

A I've never heard a name called from the back fence.

Q Have you seen someone at the facility holding up a name on a sign?

A I've seen a sign. I've seen a board. I've never seen a name on it.

Q All right, sir. These discussions that are taking place, are these two way discussions?

A From the back fence, usually.

Q Uh-huh. And, what tone of voice is used in those discussions?

A A preaching type of tone of voice.

Q Would it be fair to characterize it as sometimes a shouting voice?

A If it's shouting, it's only to be heard. A lot of times at the back fence, no, it's not shouting. Sometimes, yes, but not always.

Q Okay, sir. Now, I want to return, if I may, to your [p. 16] background and credentials, if I may. Did I understand that you're educated as a civil engineer and a land surveyor?

A Right.

Q Are you a licensed civil engineer?

A Yes, sir.

Q Are you a member of any other societies? Florida –

A Florida Engineering Society. Past president of the Indian River chapter.

Q Yes, sir. And, what is your work? What is your work, sir, for Brevard County?

A I handle traffic problems. I design traffic signals, roadway – small roadway geometrics, sign installations, striping, that kind of thing.

Q So essentially, you handle traffic engineering for Brevard County; is that correct?

A I don't handle it all. I'm not the division director.

Q No.

A But, I answer directly to him.

Q But, is that what you do?

A I do that. Yes, sir.

Q And, so you work for the traffic division for Brevard County?

A Traffic engineering division.

Q Okay. I'd like to, if I may, go back to a couple of [p. 17] the pictures.

Your Honor, may I?

THE COURT: Sure.

Q I want to make sure I understand, Mr. Unterberger. I now show you Plaintiffs' Exhibit Ten which shows people walking along side U.S. One side of Aware Woman Clinic. See that, and if you would hold it up after you see it just to remind the judge which picture that is.

Is it your testimony, first of all, do you know the people who are pictured there?

A I recognize Dick Vanderbilt (phonetic). And, the man on the right is Ed Michless (phonetic) and that's his daughter in the middle. I believe that's his daughter.

Q And, those are the people you've cooperated with in handling demonstrations at Aware Woman's Clinic; have you not?

A Cooperated with? I've been there with them and talked to them.

Q Yes, sir. Now, is it your testimony that what they're doing there is dangerous?

A No. I don't believe it's that.

Q All right, sir. And, let me ask you the same question as to Plaintiffs' Exhibit Eleven.

A There is potential there.

Q All right, sir. Now, first of all if you can identify for us the people who are in Plaintiffs' Exhibit [p. 18] Eleven?

A I believe I see Regis Albert (phonetic). I can't see – I can't make out the rest.

Q Do you recognize at least someone there who you have cooperated with in conducting demonstrations at Aware Woman's Clinic?

A I have been there at the site with them.

Q All right. And, is it your testimony that is dangerous?

A No.

Q Technically?

A No. There's a potential there if people – People tend to crowd the highway –

Q All right, sir.

A – then it gets dangerous.

Q All right, sir. Now, as to Plaintiffs' Exhibit Nine which shows people kneeling, praying, is it your testimony that that is dangerous?

A That is not dangerous in that picture.

Q Indeed, as to that picture, Plaintiffs' Exhibit Nine, is it your testimony that you were actually standing there to demonstrate?

A I had stood there and I have kneeled there praying.

Q And, you certainly, as a traffic engineer, wouldn't be doing something if it's dangerous to traffic; would you?

[p. 19] A No, sir.

Q And, that is across the street; is it not from Aware Woman's Clinic?

A It's across the street, but it's only about twenty feet wide.

Q Un-huh.

A There's a lot more street there.

Q Yes, sir. All right, now. I'd like to go to this time of your arrest now. For purposes of this question, we're now talking only after September 30, 1992. Have you been arrested other than this one time that you identified?

A No.

Q All right, sir. Now, as to that arrest, were you – that day of your arrest, didn't you actually cross a police baricade [sic]?

A There was an orange baricade [sic] there. It is – It wasn't clear. It only had one leg on it. It was just kind of sitting there. I walked around it.

Q And, you walked around it?

A I didn't – well, walked around it, sure.

Q And, were you asked by a policeman –

A Sure was. And, let me also explain there were no baricades [sic] in the other direction. If I had walked

around the block I would not have crossed a baricade [sic] to get to that location.

[p. 20] Q I understand that. But, at least there was a baricade [sic] there and you understood before walking there that a policeman did not want you to be in that area.

A No, I did not.

Q But, you did understand after you walked there –

A Yes, sir.

Q – that he didn't want you there?

A Yes, sir.

Q But, you didn't decide to follow the police officer's instructions?

A America is not a police state.

Q Yes, sir. I think that's probably right. But, I wonder whether you feel any obligation to follow the police officer's instructions?

A In general, yes.

Q Did you think that the police officer was giving these instructions because he was attempting to keep some order at the site?

A No.

Q And, what do you think the police officer's purpose was?

A I think he was being arbitrary.

Q All right, sir. Now, are you familiar with the Melbourne Police Department?

A Somewhat, yeah.

[p. 21] Q Do you know Captain Allgeyer?

A I would know him if he walked in here.

Q You would. Do you consider Captain Allgeyer an arbitrary person?

A Concerning us in a lot of respects, yes.

Q All right, sir.

A In certain areas.

Q Now, do you understand that Captain Allgeyer had actually proposed having a different format?

A No, no I didn't.

Q You did not know that.

A No, sir.

Q Now, do I understand that the place that you wanted to be on the day that that picture, Plaintiffs' Exhibit Nine, the place you wanted to be was the place where kneeling and praying are actually located?

A Yes.

Q All right, sir. And, if I mark on – if I go to Plaintiffs' Exhibit A, it would be somewhere right about in the area where I'm pointing to here?

A Approximately. It would be a little bit more to the right, but, yes.

Q But, it would be across the street –

A Yes.

Q – from the – Thank you, sir. Now, indeed, as I [p. 22] understand your complaint with the police is that you – is that you thought the policeman was being arbitrary because he wouldn't let you be there?

A Yes.

Q All right, sir. Now, is it – Now, is it – Would it then be useful to your rights to know exactly where you can be?

A Useful to my rights?

Q Yes. You wanted to be in this location you just identified right here. If the Judge were to fashion an order which was rather precise allowing you to be there, that would guaranty [sic] your right to do the very thing that you were trying to do when you were arrested; wouldn't it?

A From the aspect it would allow me to be there?

Q Yes, sir.

A That would be fine.

Q All right, sir. As to this testimony, sir, about which side of the street is the safest, do I understand the testimony that you've given concerning the safety of the south side of this street – I hope I have my directions right today, Your Honor – the south side of Dixie Way versus the north side of Dixie Way to be predicated on the question of whether or not cars can stop?

A No. It's predicated upon the space for the number of people to be where they are.

[p. 23] Q All right, sir. Now, let's examine that for a moment.

A There was also another aspect of the cars stopping to get sidewalk counseling. They would stop in the street.

Q All right, sir. As I understood your testimony earlier, you were concerned about whether the people who were going into the clinic would have access to the literature. Is that right? Is that your concern?

A I believe I said that they would not have as good access as they turned in there because you're on this side and you can only approach the passenger side of the car and they have no control over the car.

Q Who has no control?

A No. You can approach the driver's side. Okay. You can approach the driver's side.

Q I'm sorry now. You are speaking as –

A I'm speaking as handing out literature.

Q You're not speaking as a traffic engineer?

A Not at that point, no.

Q Okay. I was confused about that. But, now so far, not speaking as a traffic engineer, but speaking as someone who's concerned about getting the literature to the people, what you're saying is it's harder to approach the cars?

A Yes.

Q All right, sir. Now, on the otherhand, if the [p. 24] people in the car want the literature, there are many ways they can get the literature; can they not?

A The only way is to roll down their window and take it.

Q They could park in the facility and walk back across the street and take it; couldn't they?

A Not with the pro-abortion people lined up across the driveway.

Q You've never seen any pro-abortion people stop someone from coming out to take literature.

A Yes, I have.

Q Yes, sir. And on what occasion was that, sir?

A It was prior to September thirtieth, but I've seen it.

Q All right, sir. Now, you're saying someone's been restrained from coming across the street?

A From coming out of the parking lot, yes, sir.

Q You do agree that there's an area that's been used for parking in this area?

A Yes, sir.

Q And, it's this vacant lot area?

A I park there.

Q All right, sir. And, the owner of that lot has given permission to park there?

A I have no direct knowledge of that. I've heard that.

[p. 25] Q And, all right, sir. And, if someone who wanted to pull into that area and take literature, they could certainly do it; could they not?

A Yes, sir.

Q All right, sir. And, this isn't the only place literature is passed out; is it? Literature is available in other places?

A I'm sure it's available just about everywhere.

Q And, you've actually got counseling clinics in other places in Melbourne; haven't you?

A Uh-huh.

Q Don't you know about those?

A Yes.

Q Where literature is passed out?

A Absolutely.

Q And, people who want to get the literature are free to go to those places; are they not?

A Sure.

Q All right, sir. So, again, you've told us that you're not discussing – that you're talking about literature, that you're not discussing this as a traffic engineer.

A Right.

Q But, you did indicate, now, that there was some, as a traffic engineer, there was some more favorable

aspects to the north side of the street than the south side of the [p. 26] street.

A Yes, I did.

Q Now, that was because there was a sidewalk there?

A Yes, primarily.

Q Yes, sir. Now, the sidewalk is not a very long sidewalk; is it?

A Well, if you add the driveways in, it goes pretty much along the whole front of this property.

Q Yes, sir. It's goes from the one parking lot to the other; does it not?

A Right.

Q That's all it is.

A That's – Yeah, sure.

Q How wide is that sidewalk?

A The drawing here says four feet. It maybe five. I'm not sure.

Q Now, what's been done at, as you look at the picketing and the sidewalk counselors, there is an attempt to put a steady stream of people along the driveway; is there not?

A Not an attempt. That's not an attempt. That's pretty much what we walk, yes.

Q That's the way it's done?

A Yes.

Q And, some sidewalk counselors are out there to approach the cars as they come up?

[p. 27] A Not – you know, until recently our approach has been to have picketors stay more toward the second parking lot and only have sidewalk counselors there.

But, the – with the amount of activity within the parking lot and the shouting from the pro-abortion people, and the fact that they have lined people across the driveway. And, when they did line people across the driveway, we didn't see any particular problem with walking across it. It was already blocked.

Q All right, sir. Of course, the pro-abortion people step aside as soon as a car comes; don't they?

A Yeah. And, so did we.

Q Okay. We have seen some of that. Now, as these people walk along the sidewalk, how many people can be accommodated on that sidewalk in your estimate as an engineer?

A As an engineer?

Q Yes, sir. You wouldn't want to put two hundred to four hundred people on that sidewalk; would you?

A I certainly wouldn't put four hundred on that sidewalk.

Q No, sir.

A No, sir. I wouldn't.

Q And, indeed, if you were to do that, wouldn't you agree as a traffic engineer that the inevitable effect would be that the people would spill over from the sidewalk into the [p. 28] street?

A I've seen that happen.

Q And, you've actually seen it happen. Yes, sir. And, now do you agree as a traffic engineer, as I understood your point, was that the sidewalk on the north side provided some definition. That is we had a piece of concrete laid down.

A Sure.

Q But, there is still some right-of-way other than the sidewalk, isn't there, on the north side?

A Yes.

Q And, again, you frequently see people walking along this four or five foot wide sidewalk, walk on the grassy area?

A I've seen them walk there.

Q Beside the sidewalk. People don't pay much attention to the sidewalk; isn't that really right?

A That's not true. They generally walk on the sidewalk.

Q All right, sir.

A There are exceptions. You might stop or people might walk around somebody.

Q Uh-huh.

A They may stand –

Q Yes, sir.

A – off the sidewalk so others can walk by.

[p. 29] Q What you like about the north side, distinct from the south side, is that there is a definition there. There's a line drawn by the sidewalk itself.

A It's clear where to walk. It's very clear where to walk.

Q So, that your preference for the north side against the south side would be remedied by having a clear place to walk?

A It would be helpful.

MR. D'ALEMBERTE: All right. May I check just a moment, Your Honor?

Your Honor, I've concluded except to offer Exhibit Triple E, which the witness says was mailed to him, recognizes as having been mailed to his house, I guess after March 27, 1993, from Operation Rescue National and IMPACT.

MR. WEISS: Your Honor, I object. Plaintiffs have rested their case in chief. This is part of the Defendants' case. I don't know why it would be offered in the Defendants' case. It would be out of order.

MR. D'ALEMBERTE: At this point it would make no difference in terms of procedure, Your Honor.

THE COURT: This is not normally when you would do that.

MR. D'ALEMBERTE: I've had it authenticated. And, [p. 30] what I'll do at this point, Your Honor, is simply when the other side rests, we'll offer it as an exhibit.

THE COURT: All right.

CROSS-EXAMINATION

BY MR. WEISS:

Q If the pro-abortion folks stayed on the clinic property, would there always be room for the pro-lifers to peaceably walk on the sidewalk?

A Ninety-nine percent of the cases I would believe so. There might be, you know, might be a lot of people out there some time, no there wouldn't be. If there were a thousand people, no you couldn't put them on the sidewalk.

Q But, on every occasion that you've been out there, the pro-aborts have come down to the sidewalk.

MR. D'ALEMBERTE: Excuse me, Your Honor. I think we're back into pretty much leading questions again.

THE COURT: Mr. Bailiff.

MR. WEISS: I'll rephrase the question.

Q Do the pro-abortion forces restrict themselves to the clinic property?

A No.

Q Where do they go?

A I've seen occasions where they've come right down on the sidewalk and marched around shouting loudly as people were [p. 31] quietly praying on the sidewalk.

Q All right. Did they come within an arm's length?

A Absolutely. Within inches.

Q Have you ever heard noise emanating from the clinic? Loud noise?

A From inside the clinic?

Q Bull horns on the outside?

A On the outside, I've heard bull horns from the outside.

Q Okay. And, who's operating those bull horns?

A People who were in the leadership within the clinic escorts and so forth.

Q Do you know of every potential patient who maybe seeking abortion services in Seminole or Brevard County? Do you know who they are?

A No.

Q Do you know of any potential employees of abortion clinics in Orange – I mean Brevard and Seminole County? Do you know who they are?

A No.

Q Do you know who all the staff is of all abortion clinics in Seminole and Brevard County?

A I don't believe I even know all the abortion clinics in Brevard and Seminole County? I may, but I don't know.

MR. WEISS: Nothing further, Your Honor.

[p. 32] THE COURT: Mr. Cadle, let me ask a couple of questions.

When there's activity on this street or in that area, does traffic have a regular flow to it or is that flow interrupted?

THE WITNESS: I've seen it interrupted.

THE COURT: What causes that interruption?

THE WITNESS: I have seen it done a number of ways. I've seen it happen when the police department has interrupted it by placing baricades [sic] way out near the street.

THE COURT: On the paved surface?

THE WITNESS: I believe it was – it was somewhere between the sidewalk and the edge of the pavement on the street side of the sidewalk. I don't recall exactly where they had them that one Saturday.

I've seen the commotion in the driveway slow people down. And, that commotion generally is caused by the line that the pro-abortion people put across that driveway.

THE COURT: A painted line or a line of bodies?

THE WITNESS: A line of bodies. A painted line certainly wouldn't cause that.

THE COURT: I just wanted to know what kind of line.

THE WITNESS: A line of people.

THE COURT: Are the people in vehicles on the [p. 33] roadway, you know, entitled to expect a regular flow of traffic?

THE WITNESS: Sure.

THE COURT: All right. Thank you. You may inquire, Mr. Cadle.

REDIRECT-EXAMINATION

BY MR. CADLE:

Q Mr. Unterberger, I believe you made a statement earlier regarding a difference in slope, perhaps from the south side to the north side or slope –

A There's some dirt piled up along – it's roughly on the property line, but it does, I believe, extend somewhere in the right-of-way line is my recollection across the vacant lot. And, the yard of the house directly across from the driveway, as you can see here, slopes up pretty fast. It's not too bad in the right-of-way. But, you know, it tends to keep people toward the street.

Q Because it slopes up away from the street?

A Right.

Q Is that slope on the north side of Dixie Way?

A Right.

Q Is that slope different from the slope on the north side of Dixie Way?

A Yes, it is.

[p. 34] Q And, how is that different?

A Well, on the north side, the sidewalk is pretty flat. I know there is some slope to it, but it is generally flat. And, the slope into the grass is much more gentle than it is on the south side.

THE COURT: Now, is this dirt showing in that photograph?

THE WITNESS: No, I don't believe so.

THE COURT: Where are they from –

THE WITNESS: They're down here.

THE COURT: To the east?

THE WITNESS: Yes, sir.

Q Would that be over on the vacant lot?

A Yes.

MR. CADLE: Your Honor.

Q In the photographs that you looked at there were people lined up along the right-of-way area on U. S. One. We also had previous testimony about numbers of people on the sidewalk area along the north side of Dixie Way. Do people move from being on the north side of Dixie Way around the corner on to U. S. One?

A Sometimes.

Q Are there – Have there been picket lines that go from U. S. One to the north side of Dixie Way moving –

A Yes.

[p. 35] Q – lines of people?

A Yes, there have.

Q We're looking at actual picket lines going around the corner back and forth in this area, Your Honor. So, that's a frequent or has been a frequent activity of people going from north Dixie Way to U. S. One?

A Yes.

Q Do you have occasion to see people sometimes stay on U. S. One side for a while and then move and go to the north of Dixie Way?

A Yes. Sure.

Q As a public traffic engineer, if people were on the south side of Dixie Way and chose to walk over to this area, would that create a hazard?

A There better be somebody there. They better be careful crossing the street there at the corner as part of –

Q Is there any kind of a crosswalk area markings?

A There is no crosswalk markings. It's a potentially hazardous area.

Q Is there on U. S. One any kind of a caution sign in that area?

A No.

Q So, if people chose to go from the south side of Dixie Way to the west side of Highway U. S. One, they'd

have to cross diagonally or come down and go straight across Dixie [p. 36] Way at this intersection?

A Yeah. They'd probably tend to stick really close to the street so they wouldn't get arrested cutting across Dixie Way.

Q Okay.

A They'll stay close to U. S. One would be my opinion.

Q And, in your opinion – Mr. Unterberger, in your opinion, would pedistrian [sic] movement from the south side of Dixie Way to the east side of U. S. One be a public safety hazard?

A I believe the distance across Dixie Way within the U. S. One right-of-way is quite wide. It could be a problem.

Q Have you ever had occasion to see people along this area of U. S. One picketing, standing still, praying, have you ever had occasion to see traffic swerve off the road and try to hit any of those people?

A Yes. Yes, I have. I've seen on at least two occasions where cars have at least swerved, which is very dangerous even if they're not trying to hit somebody.

Q Have you had occasion to see any displays of anger by drivers driving on U. S. One towards the people standing along –

A So many times I can't count them.

Q So many times you can't count?

A So many times I can't count them.

[p. 37] Q Is it –

A All kinds of verbal abuse, people throwing pennies, flipping birds, shouting obscenities.

Q Is it your opinion that to increase the number of people along U. S. One would be an increased risk because of those signs of anger and cars that have swerved?

A Certainly a good possibility. I think the more people you have on U. S. One, you've got more pedestrian vehicle interface and that's potentially hazardous.

Q I believe you told the other counsel, he was asking about having taken a ladder to the vacant area behind the fence at the top of our map here. And, you said there was some two way discussions.

A Yes, there was.

Q From that area. Is it a little quieter back there –

A Sure.

Q – from out on the street?

A Yes.

Q So, there's more opportunity for dialogue?

A Sure. There's fewer people.

Q From what you've observed of any dialogue, two way discussion over this fence at the back of the property, would it be possible to carry on the dialogue if the people on the ladder were say fifty feet north of there?

[p. 38] A No. It wouldn't be possible.

Q Could you describe what that property is like to the north of that fence?

A It's wooded with dense underbrush, a lot of these vines that grow up trees. And, it's very difficult to move through.

Q If, in fact, someone was fifty feet north of this fence, would they be able to see, in your opinion, the fence?

A They couldn't see much of it. They could probably see pieces of it.

THE COURT: Would your answer be the same if it was thirty-seven feet?

THE WITNESS: I think it would be a problem. I really do.

Q How far from the time you would leave this fence heading due north, how far until you are into a wooded area?

A Probably about twenty feet.

Q About twenty feet. You described earlier the situation of your arrest, that there were baricades [sic] and that you went west on Dixie Way.

A Yes.

Q Is that away from Aware Woman Clinic? Is that heading away from their property?

A West is heading away.

Q So, you were actually getting farther away?

[p. 39] A Right.

Q Was there a reason you didn't want to be behind the baricades [sic] that were set up there?

A There were a lot of people there. And, not a particular reason.

Q Was it a crowded situation?

A It was crowded. It was crowded. It was quieter down the street a little ways.

Q And, you went to a quieter place to be able to pray?

A I went to a quieter place. I was praying. I thought it was a better place to pray.

Q And, there was some question about did you want to be there. When you arrived on that particular day, was this the place you wanted to be?

A Not particularly.

Q Would you have preferred to have been on the other side?

A Absolutely.

Q Is that normally where you -

A Yes.

Q - participate in activities?

A Yes. Yes, it is.

Q And, you weren't allowed to be on that side of Dixie Way that day; is that correct?

A Correct.

[p. 40] Q So, it wasn't your prime spot you chose to go there.

A Right.

Q You went there when you weren't allowed to go where you normally go.

A Right.

Q And, again, just for the record, if a car pulls in off of U. S. One, they're in the right lane here. Would they have to swerve across to the other side of traffic to be able to take literature from someone who was off the road on the south side?

A I would believe so. The way the Melbourne Police Department is, they would tend to, if you stuck your big toe over that line to hand somebody some literature, they would arrest you on the spot.

Q So, if you were not allowed to step into the road at all, if you were confined to the south area, would it be possible to hand literature to a car? Would they have to swerve across the road to get close enough?

A No. You would be ten or twelve feet from them.

Q You would be ten or twelve feet away from them.

A Right. They would have to come into right – west – they would have to go into the wrong lane.

MR. CADLE: No further questions.

THE COURT: Dr. Snydle referred to you as Bruce on various occasions. Do you recall the last time he may [p. 41] have done that?

THE WITNESS: I don't recall the time. I don't recall the exact date.

THE COURT: Was that before or after September thirtieth?

THE WITNESS: I would think there was probably one occasion after the thirtieth. But, I can't give you an exact date or time.

THE COURT: After that date –

THE WITNESS: It was at Aware Woman.

THE COURT: After that date did you see him on other occasions?

THE WITNESS: Yes. I've seen him after that. I've seen him at Aware Woman after September thirtieth.

THE COURT: Did he continue to use Bruce or did he address you by your proper name?

THE WITNESS: In recent months he has not addressed me as anybody.

THE COURT: Any further inquiry?

MR. D'ALEMBERTE: Your Honor, we need to keep this witness available to the Court in case of the technicality of bringing him back.

MR. WEISS: I withdraw the earlier objection, Your Honor, with respect to and admissibility of the document I don't want him to have to hang around.

[p. 42] MR. D'ALEMBERTE: That was my only worry.

MR. WEISS: So, I'll withdraw the objection.

THE COURT: Let it be received then. Now, may this witness be excused?

\MR. D'ALEMBERTE: Yes, sir.

THE COURT: Thank you, sir. The Court would excuse you.

* * *

CERTIFICATE OF REPORTER

STATE OF FLORIDA :

: ss:

COUNTY OF ORANGE :

I, Margie L. Breit, Notary Public for the State of Florida at Large, do hereby certify that the foregoing proceedings were reduced to shorthand in the presence of the within-named parties and later transcribed; that the foregoing is a true and correct transcription of the excerpt of the proceedings as aforesaid.

I do further certify that this hearing was taken at the time and place in the foregoing caption specified and was completed without adjournment.

I do further certify that I am not a relative, counsel, or attorney for either party or otherwise interested in the event of this action.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my seal of office on May 8, 1993, in Orlando, Florida.

/s/ Margie L. Breit
MARGIE L. BREIT

My Commission Expires:
October 7, 1994
Commission No: CC053127

[SEAL]

[p. 1] IN THE CIRCUIT COURT
OF THE EIGHTEENTH JUDICIAL
CIRCUIT IN AND FOR SEMINOLE COUNTY, FLORIDA

WOMEN'S HEALTH CENTER, INC.,
AWARE WOMAN CENTER FOR CHOICE,
INC., EPOC CLINIC, INC., AND
CENTRAL FLORIDA WOMEN'S HEALTH
ORGANIZATION, INC.,
Plaintiffs,

vs.

OPERATION RESCUE, OPERATION
RESCUE AMERICA, OPERATION
GOLIATH, ED MARTIN, BRUCE CADLE,
PAT MAHONEY, RANDALL TERRY, JUDY,
MADSEN, AND SHIRLEY HOBBS,

Defendants.
_____/

BEFORE THE HONORABLE
ROBERT B. MCGREGOR
JUDGE OF THE COURT

A hearing in the above-styled cause was held at 9:30 o'clock a.m., on Wednesday, the 24th day of March, 1993, in a courtroom of the Seminole County Courthouse, Sanford, Florida, before Margie L. Breit, Notary Public for the State of Florida at Large.

[p. 2] APPEARANCES:

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TRANSCRIPT OF PROCEEDINGS

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[p. 3] WHEREUPON:

The following proceedings were had:

PAM DOYLE

a witness herein, having first been duly sworn, was examined and testified as follows:

DIRECT-EXAMINATION

BY MS. PATRICK:.

Q Tell the Judge your name, please, ma'am?

A Pam Doyle.

Q Ms. Doyle, please speak up. You're verysoft spoken.

A Okay.

Q Where do you work?

A I work at the Aware Woman Center for Choice in Melbourne.

Q And, during the past eight months or so have you been the subject of demonstrations and pickets at your home in which the Defendant Bruce Cadel [sic] has been involved?

A Yes, I have.

Q All right. What I would like to do is for you to tell the court about those experiences. In August of 1992 would you tell the Court what happened [p. 4] at your home.

A It's really hard to tell. I'm sorry.

Q Ms. Doyle, do you know the Defendant Bruce Cadle?

A Uh-huh.

Q Why don't you tell the Court how you know him.

A Prior to divorcing my husband a year ago we had thought about selling our home. He was an advertised

real estate agent. His son Brent was also my daughter Heather's personal boyfriend at school.

That's how I knew him. And, that deal fell through. My husband and I were divorced.

We had moved into the apartment and after the divorce, my three daughters and myself had been there approximately two weeks. This was on a Sunday afternoon.

Q That would be in August of 1992?

A Yes. That's correct. And, we were returning home from their father's house with some belongings that were still there. And, on one of the trips up the stairs had noticed two little girls coming down the stairs. We moved over to let them come down the steps.

I noticed they were putting some leaflets [p. 5] down in the front of the doors. And, I looked down and I noticed my name. And, I knew just immediately what it was.

MS. PATRICK: May I approach the witness, Your Honor.

THE COURT: Yes.

Q Ms. Doyle, I'm showing you what has been marked for identification as Plaintiff's Exhibit PP?

MR. WEISS: May I take a look at it first, Your Honor?

MS. PATRICK: I believe you saw it the last time. It certainly –

MR. WEISS: You gave me a whole stack – a set of copies. You flashed them at me for a few seconds. I don't have a photographic memory.

MS. PATRICK: Counsel, you sat at the table with a considerable amount of time to look at this. I don't want to bypass you.

While counsel is looking at the exhibit, let me ask a few clarifying questions of Ms. Doyle to try to speed things up.

Q Ms. Doyle, are you familiar with an organization known as Rescue America?

A I'm familiar with their recent actions or their actions toward me and my family.

[p. 6] Q Ms. Doyle, would you have a look, please, at the exhibit that is marked as Plaintiff's PP?

MR. WEISS: QQ?

MS. PATRICK: It's actually double P.

MR. WEISS: Your Honor, so the record can be clear, the terminology, this is the first time anybody used Rescue America. I believe the stipulation in all the prior testimony did not involve my clients or Rescue America and I think she is contradicting that. I don't want there to be confusion about that.

MS. PATRICK: No. I think, let me clarify this. This witness, Your Honor, is not going to testify as to Rescue America, Ed Martin, Ms. Madsen, and Ms. Hobbs –

MR. WEISS: Thank you.

MS. PATRICK: She is being offered as to activities of the Defendant Rescue America, excuse me, Operation Rescue, it's the Impact Team and Defendant Cadle.

MR. CADLE: Your Honor, I would object to this document being offered into evidence. It was stated that it was published for distribution in August prior to this Court's permanent injunction of which there is a motion [p. 7] we're here to deal with.

MS. PATRICK: Your Honor, what I would like to do is to begin to show beginning in August of 1992 the lengths to which Defendant Cadle has gone with relevance related to his conduct in connection with the violation of the permanent injunction. If I may proceed, I will be brief.

THE COURT: With your theory of how it is, right.

MS. PATRICK: Your Honor, we will have to show –

THE COURT: We have to assume that once he was put under the court order he has since obeyed the court order not to do those things he may have been doing previously.

MS. PATRICK: Your Honor, we will show that subsequent to the distribution of this leaflet and subsequent to the entry of the court order in December of 1992 and February of 1993 Defendant Cadle was responsible for some personal harassment of Ms. Doyle at her home both in the form of pickets and in the form of an Impact Team descent upon her home in the early morning of

February 20, 1993. And, it is a continuing pattern of conduct.

[p. 8] So, even though this predates the permanent injunction, it shows this witness' familiarity with Defendant Cadle, his control over the harassment that has been directed against her which is part and parcel of the conduct at issue.

MR. WEISS: Your Honor, I also object to this document. It does not say who authored it. To my knowledge it does not have a name on it. I do not see at least an organizational name on this document.

THE COURT: Well, if you will proceed with the predicate before I make the final decision here.

Q Ms. Doyle, on the day in August of 1992 when these leaflets were distributed at your home, did you see the people who were distributing them?

A Yes.

Q Would you describe them?

A You mean the young ladies?

Q Uh-huh.

A There were these two young girls of approximate ages I don't know, somewhere probably younger than my oldest daughter who is sixteen. Probably somewhere between the ages of twelve and [p. 9] sixteen.

Q All right. And, after they left the premises did you see those girls approach anyone outside your apartment?

A Yes. I wasn't aware at the time. Apparently I was unaware that there were people out on the roadway until I did go out to find my daughter and see what was going on and meet the police.

And, then I saw the girls after the police told them that they were trespassing, that they needed to leave the property. They walked toward the group that was out on the road.

Q And, did they walk toward any particular individual out on the road?

A Well, Bruce Cadle was out there.

Q Did they walk towards Mr. Cadle?

A Yeah. They walked towards the group of which Bruce Cadle was part of.

Q Did you see them speak with Mr. Cadle?

A Yes, I did.

Q Was the group in which Mr. Cadle was standing carrying picket signs?

A Yes, they were.

Q What did the signs say?

A Signs with my name on them saying that I [p. 10] was a baby killer.

Q And, is this the leaflet that was distributed in connection with the picketing at your home in August of 1992?

A Yes. It is. It was also redistributed at the second picketing.

Q All right. And, the second picketing occurred in what?

A December thirteenth.

MS. PATRICK: Your Honor, at this time we would offer. Plaintiff's PP for Identification.

MR. WEISS: I don't believe it's been properly authenticated my clients, I'm sorry, not my client, that this party Mr. Cadle has not authored the document or disseminated it. It hasn't been properly authenticated who the author of it is. She doesn't know who the author of it was.

MR. CADLE: In fact, Your Honor, it was not presented when I was on the stand. I was never questioned relating to this document. Counsel had that opportunity to present it with a variety of other documents.

THE COURT: You've suggested, counsel, that perhaps the document itself would show a [p. 11] knowledge or relationship between this witness and Mr. Cadle. Does it?

MS. PATRICK: It is part and parcel of the harassment that Mr. Cadle has targeted against this witness. Perhaps if I move to the December thirteenth event, have that described to the Court. We can proceed on in this fashion.

THE COURT: At this time I sustain the objection to the admissibility of the document.

MS. PATRICK: All right.

Q Ms. Doyle, moving forward in time to December thirteenth.

A Uh-huh.

Q Would you tell the Court what happened on December thirteenth?

A Again, it was a Sunday afternoon and my children and I had just returned home. And, two of my children were outside and they returned in after about five minutes after we had been home saying that they're back. And, what do you mean they're back. She said Bruce Cadle is back outside.

Q All right. Did you go outside?

MR. CADLE: Your Honor –

A Yes I did.

MR. CADLE: I object to this line of [p. 12] questioning in the testimony. The charge, as it relates to me, according to the motion before the Court is related to the purpose of blocking or obstruction of ingress into the driveway, demonstrators totally swarming around cars, attempting to trap the patients that wee [sic] attempting to enter the driveway of the Aware Woman Center for Choice related to trespassing on, sitting and blocking, obstructing the the [sic] ingress and egress, physically abusing people at any facility in which abortions are performed.

The testimony as I understand where it's about to go is all related to a private residence not at all related to Aware Woman Center for Choice or the plaintiffs in this case. I believe it's irrelevant and immaterial.

MS. PATRICK: Your Honor, as the Court has observed, picketing at the residence of a person can be so

severe and so targeted at them as to interfere with their ability to go to and from work. And, that is exactly the purpose for which we are offering this.

As the Court will see this woman has been repeatedly harassed in her home and that is clearly relevant to her ability to enter [p. 13] and leave the facility with a sense of safety.

And, on also to the charge that Mr. Cadle has physically abused persons entering and leaving, working at the clinic. This woman works at the clinic.

She has been targeted at her home. That is clearly relevant. It does not require his physical presence in the driveway for her to violate this injunction but by his conduct so harasses her that she feels limited in her ability to go to the clinic.

And, that is the exact nature of this evidence.

MR. CADLE: Your Honor, I would further like to state that the specific charge against me, page three, paragraph C is related to being on site at the clinic in a harassing activity designed to obstruct ingress and egress to the clinic.

This whole line of questioning is related to this woman's private residence and activities which they are seeking in Motion Two to prohibit as well. I fear that this line of testimony is related to Motion Two, which does deal with going outside the residences of employees.

[p. 14] Further, Your Honor, I believe she has testified already that this is a Sunday afternoon activity. And, Aware Woman Center for Choice is not open on Sunday.

So, it could not be related to her trying to go to work on Sunday afternoon.

THE COURT: Again, it's something that depends on degree. I haven't heard the testimony. It's hard to judge in a vacuum. But, the Court can, you know, see a situation where whatever's being done at the home would prevent somebody from wanting to go work.

To the extent that it might do that, it is relevant. Overrule the objection.

Q Ms. Doyle, on December thirteenth, did you then leave your house and look to see who was outside?

A Yes, I did.

Q Did you see the Defendant Bruce Cadle there?

A Yes, I did.

Q What did you see him doing?

A Again, they were a very vocal group of approximately thirty people again with signs with my name on them stating that I was a baby killer.

[p. 15] Q What, if anything, what role did Mr. Cadle appear to be playing in connection with that demonstration?

A Well, really he was a very significant part of that group.

THE COURT: That's an opinion on your part. I need you to –

A Yes.

THE COURT: I need you to describe what you observed. I don't know what you mean by the word "significant".

A He was an active part, a member of the group of people that were demonstrating.

THE COURT: Describe what he was doing.

THE WITNESS: Carrying signs every time this has happened to me, I don't stay out there. It's difficult for me because I have three children.

Q Did you see him speak to the others involved in the picketing at your home?

A Uh-huh.

Q Did they appear to you to respond to direction, by Mr. Cadle?

A Yes.

THE COURT: You are leading her terribly.

[p. 16] Q What response did people give to any of Mr. Cadle's conduct, Ms. Doyle?

A What I heard from the group for which he was a part of was shouting at cars, cars that would go by, at other residents that lived where I lived as they entered, they handed out the leaflets.

Q All right. And, the leaflet is what has previously been marked as Plaintiff's Exhibit –

A Yes. That's correct. The same.

Q Did you see Mr. Cadle –

THE COURT: Are you saying that's the same leaflet as in August.

THE WITNESS: Yes, sir.

Q Did you see Mr. Cadle with that leaflet in his hand?

A No, I did not see. I let the police handle the situation.

Q When you went back in your house after you observed the picketers and Mr. Cadle with their signs calling you a baby killer, how did you feel?

A Trapped.

Q Did you feel free to leave your home?

A I couldn't.

Q Did you feel free to go to the clinic?

A It's hard to go there any day.

[p. 17] Q Why?

A Not knowing what to expect, personal attacks. It's hard to leave the children not knowing what's going to happen to them. Just very unprotected, very vulnerable.

Q On the day that Mr. Cadle was carrying the picket signs outside of your house, did you feel free to go to the clinic if you needed to do that?

MR. WEISS: Objection. She's – a certain amount of leading is fine. But, we're really down a long path.

THE COURT: Sustained.

Q What was your feeling with regard to your ability to go to the clinic on the day this demonstration occurred?

MR. WEISS: Same objection.

THE COURT: It's not leading in the way it's rephrased. Overruled.

A And, as and I stated every day that I do go to work it is not without fear for myself or my children.

Q What role does the picketing at your house play in that fear?

A They – being a single mother it has a very great impact on me. They are alone. It's very hard [p. 18] to leave.

Q Directing your attention now to the date February 20, 1993, was there another incident at your home?

A Yes. There was.

Q Would you tell the Court about that, please.

A It was on a Saturday. And, I had just arrived at work, just walked in the door and I received a message from Ruth Arick who was on the telephone with one of my children.

Q Okay.

MR. WEISS: Objection, Your Honor, hearsay.

THE COURT: It is not offered for the truth of the matter. It was whether or not a message was given.

Q Go ahead.

THE COURT: It was overruled?

A I was told my child was on the phone crying.

MR. WEISS: Your Honor, if a message was given, she can't talk about what was said by hearsay.

THE WITNESS: It wasn't a message.

THE COURT: Overruled.

[p. 19] Q I'm sorry. Did you speak to the child?

A Yes. I did. And –

Q Which one did you talk to and what was the conversation?

A I spoke with my middle child, Christen ten. And, the conversation was very short. All I heard, "They're here." I just said I'd be right home. I left work to go home.

Q What did you perceive her emotional state to be when you spoke to her?

A They were terrified because this time they went to my door.

Q Ms. Doyle, how many people went to your door on February twentieth?

A Approximately fifteen people.

Q Did you go home and –

A Yes. I went home.

Q What did you see when you arrived there?

A When I arrived home apparently the police had been called during the interim and had removed the

people that were there from my front door back out on to public property.

And, my main concern was just to get home to my children.

Q What did you find when you got to your [p. 20] house?

A Three terrified little girls.

THE COURT: What are the ages of your children, please.

THE WITNESS: Fifteen, eleven, and nine.

Q What did they say to you when you arrived there?

A They explained there was a knock on the door. And, the really confusing part of all of this for them and for me, that day was we were moving. We were moving the next day. They were expecting their grandmother and grandfather.

Q Ms. Doyle, why were you moving?

A We needed to find a safe place that provided some sense of security, some place if they did find us that at least it would not be invisible to the public.

Q All right. So, your children were expecting your grandmother and grandfather, their grandparents. They got –

A My youngest daughter ran and opened the door. There was a woman standing there, a man, yes, excuse me, a man with a camera.

And, what I was told from my daughter, that the woman stated that she did not have – they were [p. 21] not there to harass them, the children. But, they wanted to convince them to convince their mother not to work at Aware Woman and stop killing babies. They were going to go to all my neighbors and have them convince me.

Q How many people were there at your home when you arrived from the clinic?

A I can't state for sure. But, probably at least no less than fifteen.

Q Do you know who they were related with?

A I'm sorry.

Q Do you know who they were affiliated with?

A I can only assume they were affiliated with the IMPACT Team.

MR. WEISS: Move to strike for her to assume. And, move to strike all this line of testimony. She's making assumptions. They're affiliated with IMPACT Team. She is not testifying that Mr. Cadle did it.

I would move to strike all of this. This is baseless assumptions on her part that there is some nexus with Mr. Cadle.

MS. PATRICK: Your Honor, this witness has not testified to any matter involving Mr. Weiss' clients in connection with these demonstrations.

[p. 22] MR. WEISS: As an officer of the Court I move to strike that testimony. As there is a non-lawyer here who's getting hammered, I just think it's my oath to the Court to move to strike that testimony. It has not been demonstrated there is any nexus between Mr. Cadle and that activity.

THE COURT: You want to ask her whether Mr. Cadle was present among the group that morning?

Q Did you see Mr. Cadle there that morning?

A That morning my only focus –

THE COURT: I'm sorry, say again.

A My whole purpose was to get home to my children.

Q In your work at the Aware Woman Clinic –

MR. WEISS: Move to strike. The answer was unresponsive. The question was was Bruce Cadle there, yes or no.

MS. PATRICK: Excuse me, Your Honor.

THE COURT: Can you answer the question, please?

A To my knowledge I did not see Bruce Cadle that day.

MR. WEISS: All right, Your Honor, I would [p. 23] renew my motion to strike all the prior testimony. No nexus demonstrated to Mr. Cadle.

MS. PATRICK: Your Honor, I'll draw a nexus if you like.

Q In your work at the Aware Woman Clinic, Ms. Doyle, have you become familiar with what is called members of the IMPACT Team?

A Yes.

Q Did you see what you know to be members of the IMPACT Team at your house when you arrived there the morning of February 20, 1993?

A Yes. I recognized their faces but I don't know their names.

Q All right. Now, Ms. Doyle, when you heard that they had come to your door and heard what they had said to your children, how did that make you feel?

MR. CADLE: Your Honor, I'd like to object to it. Ms. Doyle has already established I was not there. And, she is not claiming any of the other defendants were there.

The IMPACT Team is not on trial here. They are not defendants in this action. I feel that I'm being lumped in with a group of people or everything they may have done. I was not there.

[p. 24] MR. WEISS: I would renew my motion to strike, Your Honor. This is a highly inflammatory, unwanted nexus with this party.

MS. PATRICK: Your Honor, the Court observed there is a variety of nexus. One suggestion involves directing others to engage in activities. And, by Mr. Cadle has testified he admitted he was one of the organizers for the IMPACT school. He has been at that school for class

every day. He stated and that one of the parts of IMPACT Team training is to go out and conduct field exercises.

That sort of training that I suggest, Your Honor, is the nexus we have here. One of the quote unquote field exercises that has been directly effected this witness and her ability to go to work. This is the picketing at her home.

MR. CADLE: Your Honor, my testimony also showed that I was never involved in the residential picketing of the IMPACT Team and any of their residential activity. I have not been present with the IMPACT Team on those.

MS. PATRICK: Your Honor, that is it –

THE COURT: Mr. Cadle, one of the problems I [p. 25] have here, you are like the man who was going to light the fire to burn the underbrush. It got out of hand. And, you, if you put in motion a distructive [sic] force, you, even though you are not present you are responsible for that force.

MR. WEISS: Your Honor, I want to just interpose an objection. Nobody has testified that Mr. Cadle directed a single person to go out to that premises. And, Mr. Cadle, if this Court is finding whatever IMPACT Team does, regardless of whether or not Mr. Cadle instructed them, or regardless of what they do he's responsible for it then, that's a different question.

But, I don't think that's what has been charged here.

MR. CADLE: In fact, Your Honor, it appears that all the testimony –

MR. WEISS: Your Honor, there is the unrebutted testimony of Mr. Cadle, out of his own mouth, he swore under oath that he never instructed anyone to trespass. He never instructed anyone to harass. There is no foundation whatsoever that this party instructed anyone to take what are clearly offensive steps.

[p. 26] THE COURT: Counsel, you know I've heard his testimony. I have to judge its believability. And, because he said it doesn't necessarily mean it's so.

MR. WEISS: Your Honor, if anybody would come to the stand and testify that he did do this, testify that he did instruct it.

MS. PATRICK: With all respect to counsel, he can certainly cross-examine this witness on behalf of a client he doesn't represent if he wishes to do so. It is not an argument as to relevance, to argue what one witness has said over another is something for the Court to decide, not counsel.

I realize he has a desire to prevent this testimony from going forward, but I think we can complete it. I think it's clearly relevant.

MR. CADLE: I believe, Your Honor, this entire line of testimony that we've heard so far is not related to Aware Woman Center for Choice and the physical facility that is named in this court order.

THE COURT: Which?

MR. CADLE: Where she worked. None of the descriptions, none of the discussions has been [p. 27] related to being at Aware Woman as it would relate to me. It's all been related to her home.

THE COURT: Overrule the objection.

Q Ms. Doyle, with regard to the events of February 20, 1993, would you tell the Court whether the people who came to your house were on your private property?

A I don't know how to answer that because I was renting and I don't know what the law is as far as my rights as a renter were due me. I don't know. I don't understand.

Q They came to your front door?

A They knocked on my front door. If that's considered my property, then, yes.

MR. WEISS: Your Honor, I move to strike. This witness was not there when anybody knocked. She has no personal knowledge of them knocking on her front door. She wasn't there

MS. PATRICK: Your Honor, we're offering –

THE COURT: Yeah. He's right.

MR. WEISS: No adequate predicate for her to state that.

Q Ms. Doyle, after you spoke with your daughters about what had happen, did you also speak [p. 28] with the police?

A Yes.

Q All right. And, what did the police tell you about what happened?

MR. CADLE: Objection, hearsay.

THE COURT: Sustained, hearsay.

MS. PATRICK: Your Honor, I'm not offering it for the truth.

THE COURT: Yeah, you are.

MS. PATRICK: Really, no I'm not. Your Honor, I'm trying to show the overall climate that has been created by this activity and this witness' life and show its effect on her ability to go to work. All of the climate that has been created as a logical consequence of these actions is relevant.

THE COURT: But –

MS. PATRICK: It's not magic to me whether they were or weren't on private property. It is important, I think, for this Court to understand the fear that was created by this conduct.

MR. CADLE: Your Honor.

THE COURT: What's her testimony about what a policeman man have to do –

[p. 29] Q All right. Ms. Doyle, would you tell the Court how you felt after you saw the people who had been at your house?

MR. WEISS: Your Honor, cumulative at this point.

THE COURT: Move forward.

MS. PATRICK: I don't think I have in connection with the February twentieth events, Your Honor. We have only inquired as to December.

THE COURT: All right. You may make the inquiry.

Q Would you tell the Court, Ms. Doyle, how you felt after the events of February twentieth?

A I felt because they came so close at that time to my family we'd been raped, our privacy invaded.

Q What did you do, Ms. Doyle, the day after this happened?

A We moved.

Q Why did you move?

A Because as I had said before I needed a safe place for my family.

Q And, what steps did you take as a mother to deal with this in connection with your daughters?

[p. 30] A I have to make arrangements every day to know exactly where they are, how they' re to get there. I have to instill in them how to be safe.

I recently had a need to write them letters.

Q What is the purpose of the letters, Ms. Doyle?

A I felt that in case one day I'm at work and the clinic is gone for some reason that bodily harm was done, I wasn't here, I wanted them to know why and how I felt.

THE COURT: Counsel, I can't understand her answer.

THE WITNESS: I'm sorry.

THE COURT: If she needs to have a recess to recompose herself or it doesn't do any good.

THE WITNESS: I can go on. It's okay. I wanted them to know.

Q Know, know what?

A Know that I loved them.

Q What effect has the picketing at your home had on your willingness to go to work each day?

A Every day I get up to go to work I ask myself can you do this one more day. Can you cross that line one more time.

[p. 31] Q What line are you talking about?

A The line of the constant and consistent harassment that takes place in front of the clinic.

Q Have you seen Bruce Cadle in that line?

A Yes, I have.

Q How many times have you seen Bruce Cadle in that line?

A I can't state an exact number of how many times.

Q Has it been often?

A Frequently.

Q Frequently?

A Yes.

MS. PATRICK: If I may have a moment, Your Honor?

THE COURT: Okay.

MS. PATRICK: That's all I have, Your Honor.

THE COURT: Okay. Cross-examination?

CROSS-EXAMINATION

BY MR. WEISS:

Q The flier that you made reference to, you have no personal knowledge who typed that document; do you?

A Of course not.

[p. 32] Q Okay. And, you have no personal knowledge as to whether or not Mr. Cadle authored it?

A No, I don't.

Q Now, you also have no personal knowledge of Mr. Cadle instructing anyone to go to your premises; do you?

A No, I don't.

Q And, you have no personal knowledge that Mr. Cadle instructed anyone on either date to approach your house?

A No. Of course not.

Q That picket line out there when those folks are exercising their Constitutional First Amendment rights to walk up and down, that scares you every time you cross that line; doesn't it?

A Excuse me, which one.

Q The one in front of the clinic which is hundreds of peaceful people out picketing. That scares you; doesn't it?

A Certainly it does.

Q And, when this walking and carrying signs sometimes on their knees praying there I think when this is happening there, ma'am, that spooks you; doesn't it?

A No, it doesn't.

[p. 33] Q That doesn't spook you?

A That's their right to do, as you said. That's their constitutional right to do that and I respect that right.

Q All right. So, it doesn't bother you in any way to get – go into the clinic when you see these folks marching, exercising their First Amendment rights in prayer –

A Prayer doesn't scare me.

Q Marching, holding up signs?

A Marching, yelling, name calling, that's –

Q Marching scares you? That's –

A Marching and yelling and name calling scares me. Yes, it does.

Q Tell me about what, what about the marching scares you when a person is holding a placard saying "Stop abortions". Tell me what scares you about that?

A I don't quite understand what you are asking.

Q Are you, as far as marching they could be walking?

A It's their presence that scares me.

Q Okay.

A The praying doesn't scare me.

[p. 34] Q As long as they're silent on their knees praying to God, that doesn't scare you?

A No, it doesn't.

Q When they get up and start marching around –

A Yelling, name calling.

Q That bothers you?

A Yes, it does.

Q Does it bother you when hundreds of National Organization of Women are on the marching line when they were yelling and screaming "Roe, Roe, Roe v. Wade"? Does that make you feel good?

A That's their Constitutional right.

Q So, pro aborts screaming, that doesn't scare you?

A When hundreds of people, they comfort me. When they' re directing that action toward me personally, no. None of them are calling me names And, they' re not preventing me from doing what I have the Constitutional right to do, to go to work.

Q Now, are you ashamed to have your neighbors know you are engaged –

A Absolutely not.

Q – in a perfectly –

A Absolutely not.

[p. 35] Q So, if you are not ashamed about it, why do you mind folks with signs marching outside your

residence letting it be known you are working at an abortionist? You are upset that it comes before the camera?

A It has to do with how I feel about that action. It has nothing to do with shame. If I felt shame, I certainly wouldn't be doing it. I'm proud of what I do, sir.

Q Has Mr. Cadle ever touched you?

A Of course not.

Q Has Mr. Cadle ever touched any of your children?

A No.

MR. WEISS: Nothing further.

CROSS-EXAMINATION

BY MR. CADLE:

Q Ms. Doyle, you said that day in August –

THE COURT: Mr. Cadle, I'm troubled by Mr. Weiss, he's already cross-examined this lady on your behalf. But, now, you want a second chance to cross-examine her. You know, you didn't stop him and I didn't stop him. It's a little unfair.

MR. CADLE: Your Honor, I was under the [p. 36] impression that we both cross-examined every witness Your Honor.

THE COURT: As it relates to his respective clients.

MR. CADLE: Since I am representing myself and all of her testimony has been directed at me.

THE COURT: Mr. Weiss has done a good job on your behalf.

MR. CADLE: I don't have the right to continue cross-examination.

THE COURT: Yeah. I'll let you do it. If we're going to continue this type of thing, I'm going to put a stop to it, I guess, Mr. Weiss.

MR. CADLE: I'll be very brief, Your Honor.

BY MR. CADLE:

Q Ms. Doyle, you said on a day in August you saw me out in front of your apartment complex. Is it –

A That's correct.

Q Do you recall what day that would be?

A August the sixteenth.

Q August sixteenth. And, you are absolutely positive that you saw me personally?

A Yes, I am.

[p. 37] Q In front of your apartment complex on August sixteenth?

A Uh-huh.

Q And, do you recall doing any interviews with the press or media after that day?

A Uh-huh. Yes, I do.

Q Do you recall any statements that you made to the press?

A Not verbatim. But, I'm sure they're in the newspaper.

Q Did you, in fact, tell the press that you quit your job as a result –

A I did quit my job.

Q You quit working?

A I certainly did.

Q And, do you recall if my name was in that newspaper article?

A I don't recall.

Q And, on that day did you see me with those fliers in my hand?

A No, I didn't.

Q Did not?

A The children had them.

Q The children.

THE COURT: Which day please.

[p. 38] THE WITNESS: On August sixteenth and December thirteenth.

Q You said that prayer does not bother you?

A No, it doesn't.

Q Does it bother you as an employee to see people At Aware Woman for Choice praying on the public sidewalk or the public right-of-way?

A Absolutely not. Prayer is wonderful.

Q You have nothing against –

A Absolutely not.

Q – people continuing to be allowed on the public sidewalk praying?

A That's correct.

Q Have you brought your daughters, since these incidents have you brought any of your daughters to Aware Woman to participate in any of the demonstrations?

A Bringing them? I don't understand what you mean by bringing? Forcing them to come? Am I asking them to come? What is –

Q Have any of your daughters, I believe you said they're ages nine, eleven, and fifteen, participated in Pro Choice demonstrations?

A My oldest Heather, like your son Brent frequently, likes to come to the clinic. I have [p. 39] allowed her to come one time. Because I felt that it would have therapeutic value for her to have a voice.

Q Do you recall the dates that she would come to these activities during the IMPACT Team training school?

A Yes, it was.

Q She came out and demonstrated with the Pro-Choice –

A One time.

MR. CADLE: No further questions, Your Honor.

THE COURT: Redirect?

MS. PATRICK: No, Your Honor. We have nothing further.

THE COURT: May this witness be excused?

MS. PATRICK: Your Honor, if the witness wishes, can she remain in the courtroom room.

THE COURT: She would remain under the rule. She can't talk about her testimony.

[p. 40] CERTIFICATE OF REPORTER

STATE OF FLORIDA :

COUNTY OF ORANGE :

I, Margie L. Breit, Notary Public for the State of Florida at Large, do hereby certify that the within-named witness was first duly sworn to testify the truth, the whole truth, and nothing by the truth; that the testimony then given by her was by me reduced to shorthand in the presence of the witness; afterwards transcribed by me; that the foregoing is a true and correct transcription of the testimony so given by her as aforesaid.

I do further certify that I am not a relative, counsel, or attorney for either party or otherwise interested in the event of this action

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my seal of office on February 1, 1994 in Orlando, Florida.

/s/ Margie L. Breit
MARGIE L. BREIT

My Commission Expires:
October 7, 1994
Commission No.: CC053127.

[p. 1] IN THE CIRCUIT COURT OF THE EIGHTEENTH JUDICIAL CIRCUIT IN AND FOR SEMINOLE COUNTY, FLORIDA
CASE NO: 91-2811-CA

WOMEN'S HEALTH CENTER, INC., AWARE WOMAN CENTER FOR CHOICE, INC., EPOC CLINIC, IN., AND CENTRAL FLORIDA WOMEN'S HEALTH ORGANIZATION, INC.,

Petitioners,

vs.

OPERATION RESCUE OPERATION RESCUE AMERICA, OPERATION GOLIATH, ED MARTIN, BRUCE CADLE, PAT MAHONEY, RANDALL TERRY, JUDY MADSEN, AND SHIRLEY HOBBS,

Respondents.
_____/

BEFORE THE HONORABLE
ROBERT B. MCGREGOR
JUDGE OF THE COURT

The hearing in the above-styled cause was held at 9:30 a.m., on Wednesday, the 24th day of March, 1993, in a courtroom of the Seminole County Courthouse, Sanford, Florida, before Margie L. Breit, Notary Public for the State of Florida at Large.

[p. 2] APPEARANCES:

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BY: CHRISTOPER J. WEISS, ESQUIRE

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[p. 3] WHEREUPON:

The following proceedings were had:

RUTH ARICK

A witness herein, having first been duly sworn, was examined and testified as follows:

DIRECT-EXAMINATION

BY MR. D'ALEMBERTE:

Q Please state your name and address and occupation?

A My full name is Mary Ruth Ann Arick. My home address is 1009 Morborough Drive in Deland, Florida.

Q Is it A-r-i-c-k?

A A-r-i-c-k. That's correct. I'm a management consultant and currently employed by Aware Woman Center for Choice and the Feminist Majority Foundation.

Q In a consulting capacity or regular?

A In a consulting capacity for both.

Q If you will describe for the Court what duties you have in your consulting capacity?

A With Aware Woman Center for Choice, I was initially contracted with in mid-September or early [p. 4] October of 1992 to provide management services, transitional management services to come in and do an evaluation of the corporation of the clinic, of the processes they were using, their staffing pattern to make a determination about the financial well-being and health of the corporation to create and monitor public relationships and making plans and advertising, to participate in staff hiring and training and to create training models for the staff, as well.

Q Did you have contact with the Aware Woman Clinic prior to September 30, 1992?

A Yes. I've known the owners and many of the staff of this Aware Woman facility since August of 1992.

Q And, your engagement as a consult began when?

A In September of 1992 I had done some work, small project work for this facility. And, in October or November of 1990, as well, a small one week project.

Q Now, is your background for some years in the area of women's health?

A Yes, it is. In 1976 I began working in family planning facilities in Pennsylvania. And, in [p. 5] 1982, moving to Florida, I managed several clinics in the Central Florida area including two of those that are involved in this injunction. The Women's Health Center out in Orlando and Daytona.

Q For the purposes of all my questions, Ms. Arick, I would like you to limit your answers to the period, let's say October 1st, 1992 forward?

A Okay.

Q And, throughout this, if you have some answer that goes beyond that, please identify you are testifying to a different time period?

A Okay. Fine.

Q All right. Now, there is a videotape. What's the number of the exhibit? It's on the left of the line?

A Plaintiffs' Exhibit XX.

MR. D'ALEMBERTE: Your Honor, that's been marked for identification. Opposing counsel has not seen

that videotape. It has been described to counsel and Mr. Cadle, which I will make a representation if I may.

THE COURT: Make the representation.

MR. WEISS: I have a concern about that.

MR. D'ALEMBERTE: Let me ask a few qualifying questions.

[p. 6] Q Are you fami1iar with this videotape?

A I am.

Q Exhibit XX, can you tell us how that was prepared?

A The videotape was edited and prepared from three separate videotapes at the Aware Woman site and at the residence of the owner Patricia and Ted Windle. Those videos were taken by volunteers and/or staff members of Aware Woman to document the demonstrations and the process that was happening at the clinic and at the residence of owner.

I supervised the editing of the pieces that were recorded on the tape that you wili see here on Saturday, just this Saturday past.

Q Now, to be sure the record is clear, you did not actually hold the camera and take the videotape?

A I did not.

Q In your editing process, did you edit out those scenes which you personally did not witness?

A The scenes that were edited are duplicative of that footage which is there. The footage of the scenes that were kept were scenes that I was present for.

Q You were personally a witness for the [p. 7] scenes, all the events depicted on Plaintiffs' Exhibit for Identification XX?

A Yes. I was.

MR. D'ALEMBERTE: With that we would now like the Court to introduce Plaintiffs' Exhibit XX to view that with the commentary by the witness explaining what the video shows.

MR. WEISS: Your Honor, let me object to the admissibility of the videotape itself. I don't think that the editing process, you know, did we just clip the inflammatory stuff? Did they photograph the pro-aborts screaming and yelling? Did she just, you know, focus the whole editing process turned against us.

We have photographs and videotapes taken by third parties, not her. And, we have a paid employee coming in and editing these obviously, obviously editing in the most favorable light to their client.

I'm very, very concerned about the inflammatory nature of them. Does the editing fairly reflect and accurately reflect conditions that took place on these sites as a result of this editing process.

THE COURT: Voir dire?

[p. 8] MR. WEISS: If I may, Your Honor.

VOIR DIRE EXAMINATION

BY MR. WEISS.

Q You receive checks from Aware Woman; right?

A I do.

Q Okay. And, they paid you for performing this editing function; did they not? That's part of your duties?

A In fact, yes. That was a part of my duties. Sure.

Q And, you took the footage and you decided on your own what portions of the footage were to be included and what portions of the footage were to be excluded?

A That's correct.

THE COURT: All right. And, you took the footage?

THE WITNESS: I did not take the footage. I supervised the editing process and was supervising the selection of the pieces in the tape.

MR. WEISS: Two problems. She didn't take the photographs. And, secondary she was acting as editor. And, so I think with respect to both of those it is inadmissible under 401.2.

[p. 9] THE COURT: Photographic-type evidence, if the witness is not – I don't know that she's been asked whether or not it represents that which it truly represents, which is an important trace with that predicate. She doesn't have to be the cameraman.

MR. WEISS: One final thing. We do have some concern with the audio portion of it because that, under the rules, constitutes a second element if we're talking if I accept the video. Then, we don't have the hearsay objection that might be made because the rule does deal with

the audio portion is admissible only if it's determined separately. And, I'm quoting from that the video portion of the audio portion, all the test for admissibility with respect to hearsay, etc.

THE COURT: Well, in as much as in this type of proceeding, I'm the trier of fact and also the judge of the law you are going, if you feel it, you know, is not representative or if it's been doctored to the point that it doesn't reveal the truth, I need your motion to strike and then I'll rule on it. I can't make that determination in a vacuum.

[p. 10] You may inquire.

DIRECT-EXAMINATION

CONTINUED BY MR. D'ALEMBERTE:

Q And, Your Honor, to make sure all the points of predicate are here, Ms. Arick, does this video fairly represent scenes on the dates that you'll testify to?

A It did.

Q And, did the audio portion fairly represent the sound of the scenes on the day you'll testify to?

A It does.

Q Now, the editing process, if I may represent to the witness, there has been testimony in this court quite a large number of videotape cameras were on the scene.

Can you tell us whether or not the videotape cameras were being operated not only by the Aware Woman Clinic, but also people in the demonstration as well?

A Yes. There were people on both the grounds of the clinic and the demonstrators operating video cameras.

Q And, news cameras were there?

A There were news cameras there. There were also police cameras there.

[p. 11] Q There is a vast amount of videotape available?

A Absolutely.

Q Do you know approximately how many hours of tape were taken by the Aware Woman Clinic?

A I would say at least six to eight hours altogether.

Q And, was this videotape editing done at my request to a half hour segment of videotape?

A No, it was not.

Q What was the objective in terms of length of time?

A It – the videotaping has been done has been done to document the outside of the facilities.

Q The editing process was trying to get something that would not take a full day of the Court's time?

A It was.

MR. D'ALEMBERTE: Now, with that understanding if we may begin a videotape. I've asked the witness to please read the time numbers that are on the videotape. We can also stop at any time you or counsel have any problems.

THE COURT: Mr. Bailiff, provide a chair in [p. 12] front of it, I guess.

THE WITNESS: I can stand.

THE COURT: Well, if it's a half hour, if it's easier, it's there if you need it.

MR. D'ALEMBERTE: Do you need a pointer for any reason?

THE WITNESS: I think that may be a good idea.

THE COURT: Stand back from it so everyone can see it.

MR. WEISS: Your Honor, with the Court's permission may I move around.

THE COURT: Surely. Do we have a start stopper?

A This is the area of the street in front of the clinic. This is activity that is normal when there are several hundred people outside the clinic.

You can hear the chanting of the pro-choice folks at this point. This is the driveway area that has been totally blocked by a steady stream of protestors. Cars can't get in and out at all.

Q This is on the –

A This is Dixie Way, eight a. m. on the sixth. Again, you see a blocking of the driveway here.

[p. 13] MR. WEISS: Your Honor, I want to interpose an objection. The term "blockage" would imply a blockage, she's testifying so that the record reflects a car being blocked. I didn't see a car.

I move that testimony be striken [sic]. It is not reflective of what is there. People are peaceably walking on the public right-of-way.

There is no evidence on that photograph of any car being denied ingress or egress of that premises.

Move that the testimony be striken [sic].

THE COURT: The number of people in the driveway area is certainly consistent with a blockage for any cars wanting to enter. There is just not any wanting to enter.

I don't think it's an unfair commentary for the number of people that – that customarily would constitute a blockage.

I'll grant you it's not put to the acid test where a vehicle seeks to enter.

MR. WEISS: And, further the identify [sic] of the persons who are in that sidewalk, who are the persons that are on the sidewalk? Do they represent the pro-aborts or do they represent [p. 14] the pro-lifers.

I think that's very relevant who each person is, which organizations are they? I don't think any of my clients were there. If they are there, I would appreciate her pointing to them.

MR. D'ALEMBERTE: That is all appropriate for cross-examination. I'll try to accommodate counsel as we go through some of this. I don't know what's on his mind.

The consept [sic] of cross-examination is fairly well accepted in common law to get at those points.

THE COURT: Yeah. If you would, I'll give you, of course, the opportunity for cross-examination.

MR. WEISS: It's going to be an awkward situation because it means we'll have to wait an hour to the end of it.

MR. D'ALEMBERTE: We'll try to help counsel.

THE COURT: The Court may have to go back and review certain portions of it.

MR. D'ALEMBERTE: We've got numbers on there, date and time numbers. If counsel would note the date and time number we could cue it up [p. 15] to the place where we want to cross-examine. If we may proceed.

THE COURT: Yes. Please?

A Here's a car trying to enter the area that was previously seen as being blocked in the driveway. We've got the one car forced to stop in the street while the police clear an area for the car to come in.

MR. WEISS: These maybe pro-choice people. We've seen no police in the area of the video. She's mentioning things that are not included in this photograph.

We have no certain identification there is a police officer or not there to clear that driveway. They may have voluntarily moved. She is testifying outside of the scope of this video evidence.

THE COURT: You are going to have to establish that there is a police officer there, if you are going to comment there is one that cleared the way.

It's a difficult type of presentation for me to identify the people there. Can you do that or not.

THE WITNESS: I can, in fact, in the [p. 16] previous portion there was an officer standing in the driveway area. If we slow this piece we will be able to pick him out.

Q There were police officers there? Set the scene?

A All day long.

THE COURT: Let's go back to the earlier footage where you saw the police officer or evidence –

MR. WEISS: You are blocking my view.

THE WITNESS: I'm sorry?

A The police officer, let's get back to that little piece again. Let me get ready.

This is – You are right. I cannot find you a police officer right there. I can –

MR. WEISS: I move it be stricken?

A I can previous –

THE COURT: All right. The motion to strike is granted. Go ahead please.

A This is a continuation of the same pattern. You see people crossing the street pretty constantly. This is U. S. One.

This is a potato stuck in the tailpipe of a car in the parking area in the lot across the street from the clinic. That was documented vandalism or [p. 17] concern for the car.

We're on 8:27 a.m. here. This is 9:22 a. m. This is protestors who's raising a white board with the name of a significant other male person who brought in a woman to the facility.

MR. WEISS: Your Honor, I'm going to object. The document does not show what you see before you. She is testifying to what's reflected on that tape. You can't see a name of any significant other. I would ask for what the video reflects, not her own testimony.

MR. D'ALEMBERTE: Your Honor, I respectfully submit she's alluded to what she saw at that scene at the time the video was done.

THE COURT: She has not given a predicate to know whereof she speaks. In other words, how does she know whoever the name on there is a significant other, to use her word. And, it's –

MR. WEISS: I understand the point.

THE COURT: It's without predicate.

Q Just to stop in this scene we just saw, would you describe in your own words about what you saw at that time?

A The woman who held the white board stood on [p. 18] a stepladder, a six, eight foot stepladder out on the sidewalk area. On the white board the name of a man who brought a patient to the clinic. I spoke with the man in the waiting room. I verified it was, in fact, his name. I saw this man's name on the white board.

If you are close enough to the video, and we could freeze frame, you can see a man's name on the white board.

MR. WEISS: Your Honor, that's hearsay. She talked to that man is absolutely –

THE COURT: That's not hearsay. She has direct evidence of that.

MR. WEISS: Who is the significant other? What's his name? I think we're entitled to that here.

MR. D'ALEMBERTE: You can see it on the videotape if you keep watching, counsel.

MR. WEISS: Aren't we entitled to that, to know what the name of the person supposedly having a –

THE COURT: It's represented to be on the poster.

MR. WEISS: I can't see it.

MR. D'ALEMBERTE: If counsel would let it go [p. 19] forward, I think you will be able to see. Your Honor, frankly all this is available through cross-examination.

MS. PATRICK: Your Honor, we would request without seeing the video through three times with cross-examination, could you we request Ms. Arick, since she saw the crowds, that she give an eye witness account of her observations separate from the video that's been taken. Could she describe as she goes where she was in the scenes just for clarification.

THE COURT: If you would. They are entitled to points of observations.

THE WITNESS: Okay.

Q Just see if we can do it that way so we can see if the point of view was significantly different from the camera's view. Please stop and identify where you were if there was any significant difference from where the camera angle is?

THE COURT: I believe it was on top of a vehicle, standing on top of a van looking over a fence. I doubt that Ms. Arick was ever in a similar position to the camera itself.

Q Were you able to see all the same scenes as the video saw?

[p. 20] A Yes.

Q Were you able to see the scenes that were shown on the video thus far?

A Yes.

Q Are you near the camera or some distance from the camera and if so, it in what direction?

THE COURT: Do we have that map? Would that be helpful.

MR. D'ALEMBERTE: Plaintiffs' Exhibit A. May we use it to point to for the purpose of my questions?

A The van was parked here in the first parking spot in the parking area here.

Q You are indicating just to the east of the entrance to the large parking lot?

THE COURT: Southeast corner of the large parking lot?

A The demonstrators throughout the day were generally across the front of the area either walking in the street, down the sidewalk area. I was monitoring their activities at my side. I was in the driveway area or I was in the staff parking area here where I had good visibility in the garden area where seeing over the fence is not difficult at all. Much of my day was spent in this specific proximity.

[p. 21] Q And, the van again, if you would point to where the van is?

A And, the van is here.

Q Was the camera always here or was the camera also moving some?

A That footage was all from the van. It was not always here on top. He maintained a position in this area.

Q Okay?

MR. CADLE: Your Honor, could I say Ms. Arick is giving factual information as an eye witness. She has previously testified that she was in the inside of the building talking to a significant other of someone else. She could not have been in two places. She could not have viewed the scene on the camera and be inside the building and talking to a significant other.

THE COURT: Okay. That is a form of argument and you know it. That is something that truly needs to be developed by cross-examination as to whether or not

both times are the same time. You are assuming they are and I can't make that assumption.

MR. D'ALEMBERTE: May we continue.

THE COURT: Yes, sir?

[p. 22] A This reflects the white board. You can clearly read a man's name. We have pro-choice people trying to block that board and making noise to try to drown out the protestors as well.

You can see traffic moving very slowly through the street because it's very congested.

Here the protestors are across the street in the area that is fairly quiet. Again you can see a steady stream of protestors with the pro-choice line right across the line to keep them from entering the property.

This is an example of people screaming. This is at 9:23 a.m. This is at 9:24. It shows the protestors standing on a stepladder behind an eight foot stockade fence on the north perimeter of the property.

Again, 9:24 a.m. This is the area where the white board was held. It was over here with a man's name clearly seen.

This is a car entering Dixie Way, forced to stop here. This is a police officer stopping the car and then coming up to instruct the crowd. We have protestors approaching the car, walking with it as it gained entrance into the property.

Again, the police officer here, two police, [p. 23] three. This is U. S. One. This is so you can see the congestion and confusion that can occur.

Police officer here in the driveway area, near the driveway. A second police officer, a police car parked up the street here many times accompanied with officers.

Again, protestors across the street as well marching in a double line here or circles, two lines.

THE COURT: This circle that's moving are they pro-choice or pro-life.

THE WITNESS: The circle that is moving are demonstrators.

THE COURT: Stop that please.

THE WITNESS: I'm sorry.

THE COURT: If you could identify those people that were moving.

THE WITNESS: They are demonstrators. They are pro-life people, sir.

THE COURT: All right.

THE WITNESS: This is Randall Terry.

THE COURT: Who is Randall Terry?

THE WITNESS: Randall Terry is the founder of operation Rescue and from what I know about him is still associated with that group.

Q Point him out.

[p. 24] A He's right here in brown.

MR. D'ALEMBERTE: And, he's a named defendant in this cause, Your Honor, not present in the courtroom.

A See the news media here. There is a lot of confusion. This is actually in the driveway area.

Q Who is that please?

A Here, this is a man whose last name is Slovanick (phonetic). I don't know his first name. He was identified by some other person who knew him for me.

Q This is Randall Terry again?

A Yes. But, look at them.

Q Right here is Randall Terry?

A Again, this is occurring in the driveway. This is just a mass congestion in the driveway.

Q This is Mr. Terry?

A This is Mr. Terry here. This is approximately 10:12 a.m. So, this all has been going on since 8:15 which is our first clip.

Q This shows the two groups closing in together?

A Yes. These two groups are pro-choice folks who are primarily in this area on the property of the Aware Woman facility.

[p. 25] Much of this is media and pro-life people all mixed together. It's very difficult to tell who is who. When you've got these kinds of large crowds –

Q Again, Randall Terry here at center?

A This is across in the vacant lot across the street. This is a child playing in a tree and people walking again on the south side of Dixie Way. This is Bruce Cadle.

THE COURT: What time is this?

THE WITNESS: This is 10:16 a.m. This is a pro-choice people who with music is trying to drown out some of the noise from the protestors.

This is the house across the street. It's currently vacant. There are no trespassing signs posted. That is one before 10:12 a.m.

At 10:20 this is another vehicle trying to gain entrance into the lot. You see the vehicle has to stop out here. The police officer here is holding the crowd back to help this vehicle get through. She is able to get in very slowly.

The pro-choice people again immediately line up in the driveway to prevent anyone from entering.

[p. 26] MR. CADLE: Pro-choice people did you say?

THE WITNESS: Yes.

A This is 11:07. You'll see a car trying to exit the parking lot, having to move very slowly. People are getting out of the way. The pro-choice people line up in a single line. Here the pro-life demonstrators again back into they [sic] driveway area.

This is 12:4 1 p.m. in the driveway. She's been identified as Michelle King with a local newspaper. That's all I know about her.

This woman has been identified as Jan with a local newspaper. I don't know the last name. Again, 12:41 p.m.

THE COURT: Stop that, if you will.

Q In the background do you see a vacant lot behind the person who's screaming?

A I think what you see behind the person who is screaming is the empty house. But, we have to turn it again for me to look. It either could be the angle. I believe it's the empty house.

Q This is right-of-way on the other side of the street?

A There certainly – There is a public access area on both sides of the street.

Q Can this person who is shouting be heard [p. 27] from across the street?

A Clearly.

MR. CADLE: Your Honor, I move to strike it as irrelevant and immaterial. This goes to Motion Number Two to the modify your decree. Did we violate it is the issue. Whether you could have heard someone across the street is irrelevant and I just –

MR. D'ALEMBERTE: I submit, Your Honor, rather than standing in a driveway which does involve ingress or egress covered by the Court order, you can communicate from across the street without blocking ingress and egress resolving the point of procedure without getting to Motion Number Two.

MR. WEISS: Judge, the only line, the people that she's pointed out are pro-choice, pro-choicers stopping people from entering that. She said the lines immediately formed.

THE WITNESS: They did not stop a single car. A single car has not been denied access.

THE COURT: That's argumentative, counsel. If you will save your argument to the appropriate time.

Q The pending question is, can you identify [p. 28] the space behind –

A This is the house. This is not the empty house. This empty house would be here to the left on the screen.

Q 12 :42 p.m.

A That's the empty house here.

Q Is this still in the driveway?

A This is still standing in the driveway. The time marker is 12:42 p.m. I have a student I. D.

Q Here, what do you need to have?

A You need an F. I. D. Did this relate here to why the girl that arrived in the white car had to be put in the car by her boyfriend?

Q Talk about malpractice insurance here?

A Talk abortion, some crawl. Some have to drive themselves. You can see that these people are across the entire driveway area where they're standing.

Q The people are identified as who?

A The people are protestors. They are not the pro-choice people. "Death of children and Ted Wendell, you are a murderer" on the tape. "Shame on you, Ted Wendell, shame on you". This is 12:44 p.m.

Q Are these IMPACT Team?

[p. 29] A We believe these two are. They have been identified as such in the newspaper. "Woman, woman, woman how many of you women have abortions? Mothers of dead babies. How many dead babies? You are plotting the death of your children. Nancy, Nancy repent. She's leading you astray. Ted and Patricia Wendell, they're leading you all astray. Turn away now for today is the day of salvation. We want to see the baby killers in jail. Baby killers in jail. Wherever they are, there will be no rest or no peace for the wicked. There is no peace and no rest for the wicked. All you people are wicked. All of you are wicked. There is no peace or no rest."

This is the video camera of one of the protestors again to show videos were everywhere.

"I pray that judgment comes. This is your worst nightmare because God, you cannot hide from God. He knows where you are."

This is at the residence of Pam Doyle, 9:46 a.m. on the thirteenth of March. This is the process being held out along the highway which is U. S. A-One-A, might be a Florida highway.

There were approximately seven to eight people in this demonstration. You can see the area around here is primarily condominiums. It is a [p. 30] residential area.

Q Fairly windy day?

A Very windy day. This is Keith Tucci.

Q Who is he?

A He is the executive director of Operation Rescue National. This is Bruce Cadle. This protest went on for something over an hour altogether. This is across A-One-A. You'll see shortly where we take a shot in front of the Wendell's residence.

Q Is this IMPACT Team?

A There are IMPACT Team members. This woman was just identified is as an IMPACT Team member.

MR. WEISS: Your Honor, proper foundation. She knows what's the foundation for her saying. She knows all this information.

MR. D'ALEMBERTE: I note that IMPACT people are not objecting. This does not go against Mr. Weiss' clients. I'm surprised to hear him make this objection to this.

MR. WEISS: Your Honor, to my knowledge, no people connected with the IMPACT Team are present in the courtroom nor are any of them named as defendants on this court order.

MR. D'ALEMBERTE: Your Honor, I will [p. 31] cross-examine Mr. Cadle on that in a bit.

THE COURT: We11, she has to give a basis for her knowledge. If you can develop that fine, otherwise.

MR. D'ALEMBERTE: I'll attempt to develop it through Mr. Cadle. Just to make sure we've exhausted this witness' knowledge of this.

Q What is your knowledge of the identify [sic] of IMPACT Team members?

A It primarily comes from newspapers where interviews and photos have been done and put in local papers where a number of these people have been identified. Additionally there is – they tend to come to the clinic as a group. And, many of these people are seen continuously with the group also with Keith Tucci who I believe is heading IMPACT training.

Q All right.

THE COURT: Keith who?

THE WITNESS: Tucci, T-u-c-c-i.

THE COURT: Okay.

Q Go forward.

A Same place. This is 9:58 a.m. on the thirteenth of March in front of the Wendell's condominium.

Q What community is this in?

[p. 32] A This is Melbourne Beach, the city of Melbourne Beach, out of Melbourne Beach.

Q Is this South Melbourne Beach? I'm sorry. I thought you said stop.

A Okay. This IMPACT Team member, she's been named as Jessica. We don't know much else. She's been in the newspaper.

Q Is this, the rest of this is pretty much the same?

A It shows the condominium. That was Chet Gallagher (phonetic), one of the IMPACT Team trainers. This is the woman who was screaming earlier.

MR. WEISS: Your Honor, if I may interpose another objection at this point. Your order is one sided. Your order in no way addresses peaceful protests in front of the Wendell's residence.

I don't see the relevance or materiality in front of their residence. It's not part of your order. You didn't say they couldn't march in front of the Wendell's residence.

I will take the position that sanctions may not be applied for something that happened outside his residence. The clinic is the [p. 33] subject of the proceedings here today.

THE COURT: That's argument.

Q Go ahead.

A You need to see the condominium. That is one of the days. Actually there is more.

Q Okay. Let's fast forward through this part?

A This is back at the clinic. This is eleven a.m. on February twentieth. This is the woman as Jessica in the papers.

Q This is February 20, 1993?

A Yes.

Q This is after the IMPACT training began?

A About a month later, yes. She's standing on a stepladder here. The proximity of this noise right here is directed at a part of the building where the recovery area and the surgical suites are.

"I am your son. Don't kill me mom. Help me, daddy, please."

This is 11:19 on the twentieth of February. Again, this shows you the protestors in the driveway. This is a day to give you a full view where there are less people than the previous marches.

Again, people are across the street. This [p. 34] is the driveway area. Again, this is one of the, we believe, the IMPACT Team. She's –

Q Going back in time now.

A This is the twentieth of February. This is the last clip. This is about a month after the IMPACT training began. It's just the way it got edited. I apologize.

Q Is this 11:31 a.m. again in the driveway?

A The singing is pro-choice people on the property. This screaming is directed at a portion of the building where many times the men who come with the women stand.

This is 11:32 a.m. on the same morning. This dark haired woman is screaming "You killed a child."

This is Sheila Eshlenberg here receiving a ticket for obstructing the driveway. This is 11:37 a.m. on the twentieth of February. This car is leaving the clinic.

11:43 a.m. on the twentieth. This is the intersection of A-One-A and U. S. One. You see people following the car out on the street, crowding around the car as it tries to get into the clinic. 11:44 a.m. Again standing in the driveway.

Q Are those people called sidewalk [p. 35] counselors?

A Yes. You see no pro-choice people standing in the driveway in the area. These folks are in the driveway without the pro-choice people being there.

This is again someone on the stepladder, 11:46 a.m.

Q What area is that?

A This is standing near a portion of the building that is the surgical suite. And, that's the end of the tape.

Q Thank you. You can take your seat. We'll leave it there?

Now, what has been your experience with demonstrations at women's health clinics since 1982? Just generally what has been your experience. You want to talk about your experiences with protesting since 1982?

Since 1982 have you known protests at clinics since 1982 when you came to Florida?

MR. WEISS: Judge, the relevance and materiality to what happen ten years ago prior to entry of the judgment of your decree is irrelevant. I don't possibly see the relevance.

MR. D'ALEMBERTE: I'm just trying to present situations with a traditional peaceful protest, [p. 36] Your Honor.

THE COURT: Yeah. Overruled.

Q Share your experience?

A I have primarily experienced with anti-choice protests in the Florida area since approximately 1982. And, I've seen protests that include hundreds of people.

They have been generally peaceful. They have been less personally threatening than they are today.

Even some of the blockades that I witnessed in different parts of the state where people trespass on property and physically remain in spite of the police asking them to leave or be arrested. Many of those blockades that I've been through I would consider fairly peaceful protests.

Q Now, focusing on activities since the injunctive order was entered in this case, actually the second injunctive order was entered in this case on September 30, 1992. Focusing on that period of time since then, would you say these demonstrations are they somewhat harsher in character? Are they different?

A Well, in fact, I've been out away at women's facilities very regularly since October of 1992 and I've seen a difference in the quality of [p. 37] demonstrations beginning about the first of 1993 and in particular clips on this video where the demonstrators, the protestors have gone to very directly and personally threatening the staff. There is a feeling of –

MR. WEISS: I'm move [sic] to strike that from the record. It does not in any way or anywhere ever reflect a strike or threat to strike if that video reflected that. I just move to strike that. It is not indicative of what's in the record.

MR. D'ALEMBERTE: Not the videotape. I'm going to show that she's been threatened. I'm going to examine that. I'm setting up the predicate.

THE COURT: Now, her testimony is not necessarily confined to what she saw in the video. She can

testify as to events gathered from her own personal observation. Counsel is not clear at this point as to the basis of the observations.

Q Now, I think your words are that they are now personally directed. What do you mean by the comments "now being personally directed?"

MR. WEISS: I just want to make sure on the [p. 38] date on this is. I'd like to know who the parties to cover–

MR. D'ALEMBERTE: The dates are since January, 1993.

MR. WEISS: Where were they? Where is –

MR. D'ALEMBERTE: The testimony is – We'll get quite specific, counsel.

Q Within that time frame, the Court would expect your answers to be within that time frame. Is that understood?

A Yes, sir.

Q All right.

A On February twentieth there were two people on the pro-life side of this demonstration appearing at the Aware Woman Center for Choice who made what I felt to be personal threats toward me.

One came from a man who was standing on a stepladder or something to get him above the eight foot stockade fence on the north end of the property.

And, in his, what I called his preaching voice from the back fence, he became very agitated, very angry, was

speaking very angrily to anyone who was monitoring the activities on that back fence on the pro-choice side.

[p. 39] I walked into that area. From the top of the fence he looked directly down at me and screamed my name and screamed, "Ruth, Ruth, I pray that God strikes you dead. In the name of Jesus, I pray Jesus strikes you dead. I pray for your death in the name of Jesus."

I don't know his name, but I can identify him from photographs and from the videotape. I don't know what his name is.

A second person that you saw on the videotape on February twentieth who the newspapers have identified as Michelle King who was standing in driveway making the comments to Ted Wendell, screaming them across the driveway.

She again made the same comments to me where she pointed at me and she screamed "Ruth, I pray God strikes you dead now."

These to me are of a wholly different caliber than the protests that I have seen in the previous years and in the previous months even at the Aware Woman facility. The tone, the intensity, and the feeling of personal threat has increased gradually.

Q Now, were you at the clinic on or about March tenth of this year?

[p. 40] A Yes, I was.

Q Were you there following the news that there had been a murder of a doctor in Pensacola?

A Yes, I was.

Q How did that day –

THE COURT: I'm sorry. You recited a date?

MR. D'ALEMBERTE: It was March tenth, Your Honor. On about March tenth.

THE WITNESS: It was.

Q Was it March tenth or March eleventh?

A It was March tenth.

Q And, how did that news reach you?

A I had been at a luncheon meeting and heard on radio that Dr. David Gunn had been shot in Pensacola.

And, I went through my luncheon meeting and returned to the clinic at approximately one p.m. And, there where in the neighborhood of six to ten protestors in the driveway.

And, when I came into the clinic the staff was talking about the shooting. We heard on the news and on the radio almost simultaneously television and radio that he had died in surgery.

And, from the office that I was working in inside the building I heard cheering, not cheering, I heard –

[p. 41] MR. WEISS: Your Honor, I'm going to interpose an objection. How does she possibly know what the motivations for the cheers that were taking place outside the clinic. The cheering could have been as a result of some events not attributable to Dr. Gunn. That nexus hasn't been demonstrated what these people were cheering for.

MR. D'ALEMBERTE: I can see it's circumstantial, but it is circumstantial. That's not the entirety of her testimony.

THE COURT: I believe he's relating to an item parolly announced on the radio and T V.

MR. WEISS: But, she hasn't laid a foundation the folks outside even knew about it or they heard it or they had a radio. A cheer could have gone up for a football game at the same time. Does that mean Dr. Gunn's death? No one knows.

THE COURT: You may cross-examine. But, there is an inference to be drawn from the testimony as it's being related. I think it's proper admissible testimony.

Q Go ahead.

A What I heard from inside with the door [p. 42] closed to the outside was "Praise the Lord. Praise the Lord, a baby killer is dead."

I had two staff people outside in the parking lot at the time who were able to confirm that for me.

Q Okay.

MR. WEISS: Your Honor, I would move to strike. It's attributable to what someone on her staff relayed to her. So, that certainly constitutes hearsay.

THE COURT: That isn't what she said, counsel. I don't want you to misconstrue.

MR. WEISS: She said someone came in and told her that.

THE COURT: She said she heard it through the door and she said people came in and confirmed that for her.

MR. WEISS: I apologize. I didn't hear that. You heard it. I didn't here it. I'm sure the record will reflect what you heard, not what I thought I had heard.

THE COURT: Thank you.

Q Now, was – Is the Defendant Pat Mahoney identified in this videotape we saw?

A He was in the videotape on March the [p. 43] thirteenth at the Wendell's condominium.

THE COURT: Which person were you referring to?

MR. D'ALEMBERTE: I'm sorry, Your Honor, a defendant who's not been mentioned before, Pat Mahoney, also not present here.

THE COURT: Having been given notice?

MR. D'ALEMBERTE: I'm sorry, Your Honor?

THE COURT: Having been given notice of these proceedings.

MR. D'ALEMBERTE: These events are subsequent to the injunction order, Your Honor.

THE COURT: I understand.

MR. D'ALEMBERTE: He was given notice, I'm sure. Yes, sir. Yes, sir.

Your Honor, on sequence I think that he was served in the original proceeding, default was taken, but we

provided him with expedited mail notice to all of the people who have been defaulted and not represented by counsel.

Q If I may briefly ask you, you received notice of – How have you received notice of the tactics of the demonstrations against the clinic?

A There have been a variety of ways. The newspapers have interviewed many of these people. [p. 44] We've read those stories. We have received fliers about their training with photographs in by – These are the trainers who are going to be involved. We have seen pamphlets and brochures that come from the Friday evening rallies that have been held in the Melbourne area.

Q All right. If I may, let me show you, first of all, a brochure marked Plaintiffs' Exhibit P and ask you if that is one of the documents which came to you?

A Yes. In fact, I actually just saw this a few days ago and received it from some folks in the Orlando area.

Q Okay. Do you know when that was collected?

MR. WEISS: Your Honor, this is something received from some folks in the Orlando area. It has no bearing on your jurisdiction.

THE COURT: I don't know until he gets finished laying the predicate if you would give him the opportunity?

A The note that's written in the corner says that it came from First Wesleyan on March the sixth which is where Randell Terry was speaking.

THE COURT: Where is that church?

THE WITNESS: I'm sorry. Here in the [p. 45] Orlando, over on Chickasaw Trail.

THE COURT: Does it have any – Does it show the publisher of it?

THE WITNESS: Yes. It's published by Rescue America and it lists the Reverend Ed Martin as executive director.

THE COURT: For what purpose are you offering it?

MR. D'ALEMBERTE: Your Honor, to show that Mr. Martin was engaged in and promoting the activity forbidden by the Court. And, as I read the third paragraph of the injunctive order, you may not do that.

And, the fact that Mr. Martin goes to Orlando to do, rather than in this jurisdiction, still we're not dealing with this. This doesn't require space travel to get from Orlando to Brevard County. And, if the activity is activity which promotes disobedience to the Court's order and urges people to violate the law as I think this pamphlet does, then we think it's in violation of paragraph three of the Court's injunction.

MR. WEISS: Judge, the date of that document is November, 1990. The publicaton [sic] date is some [p. 46] two years prior to the entry of your injunction. It was allegedly distributed to a party who has not beer named at Wesleyan Church in Orange County on March the twenty-fourth. We don't know who the party was.

THE COURT: March twenty-fourth of which year?

MR. WEISS: I have no idea. The document doesn't say. There is a hearsay notation written in the corner says three twenty-four. March sixth.

MR. D'ALEMBERTE: The sixth of March, I think is the date that's written on it.

THE COURT: Does it show it having been printed two years previously.

MR. D'ALEMBERTE: No, Your Honor, I think counsel and I would agree that the only date mentioned in here is November 1990. But, it refers to November 1990 as being a past event. That is, this could have been printed after November 1990 not on 1990.

I don't think counsel meant to imply it was printed in 1990. We don't know when it was printed. The only thing we know is when the document came to the center. And, it came to [p. 47] the center in March of 1993.

Now, perhaps through Mr. Martin's testimony or otherwise we may find that this pamphlet actually hasn't been disseminated in any way since the injunctive order.

At this point all we can do is collect the information as it comes to us, telling when it came to us. And, it came to us in March of 1993.

It is not something that came to us back in 1990. We just received the document. And, we recognize this is only circumstantial. We can't tell you Mr. Martin was there passing out this pamphlet. He may not have been.

But, at least it has some bearing because the pamphlet itself seems to call on people to violate the law. And, since we received it in March of 1993 you can understand why we're nervous about it.

MR. WEISS: It's received by pro-abortion advocates delivered to the Aware Woman Clinic. That's who delivered it to the Aware Woman Clinic.

We don't know who the party was. We don't know who they received it from.

[p. 48] If they want to bring in to the court the person who received it to testify who they got it from, where they got it from based on wild hearsay, they're saying it was obtained at Wesleyan Church on March sixth. The year is unidentified in Orange County.

The relevance of that to seek sanctions against Ed Martin here today totally eludes me.

THE COURT: Well, counsel, at this point it's not admissible. There hasn't been sufficient nexus established, if you will.

MR. D'ALEMBERTE: All right, Your Honor. And, Your Honor, let me say that part of the difficulty is that the witness who did collect it was not excluded under the rule. We did not anticipate. He's been in the courtroom. So that's my evidentiary problem. And, I think at some point I need to ask for an exception to the rule.

But, at this point we'll go forward, Your Honor.

THE COURT: All right.

Q Now, you also mentioned that you had received information from magazines. This is a magazine, which actually, Your Honor, I only marked, [p. 49] and I've shown all this to opposing counsel to Mr. Cadle.

I have one page in this magazine marked as Plaintiffs' Exhibit V but with permission of the Court, I would like to show the witness the magazine from which it was taken and have her identify that?

A In fact, this magazine was received at the owners' home and is the Life Advocate which is a pro-life magazine.

THE COURT: What is the date of that?

THE WITNESS: It's dated March, 1993.

THE COURT: And, the letter of the exhibit is V as in Victor.

Q On page thirty of that magazine is there an article which relates to Florida?

A It does. It entitled – titled Pro-Life IMPACT Team Training in Florida.

Q And, does that article quote Mr. Cadle?

A It does.

Q Mr. Tucci?

A It does.

Q All right.

A And, it shows a photograph of activities at one of the protests outside of the clinic.

Q The clinic in Melbourne?

[p. 50] A. In Melbourne, yes. I'm sorry.

THE COURT: The title of the magazine?

THE WITNESS: It's called Life Advocate.

THE COURT: Thank you.

Q And, the title of the article on page thirty?

A It's Pro-Life IMPACT Team Train in Florida.

MR. D'ALEMBERTE: Your Honor, I would like to offer this one page photocopy.

MR. CADLE: Your Honor, I would object that this is hearsay evidence since my name has been directly tied to this and I have never been interviewed for an article in this magazine. I believe this is totally hearsay. We've not been told who the author of this article is.

MR. D'ALEMBERTE: There is no author shown, Your Honor.

MR. CADLE: No author shown but I'm supposedly quoted in it.

THE COURT: Read the quotation attributed to Mr. Cadle, please.

THE WITNESS: It says, "Christians across American need to merely stand at the very place of death and the gates of hell. Unfortunately only one percent of the church is out today. [p. 51] Christians need to do unto other as others do unto them."

And, it goes on to say "Cadle remarked that if he were being led away to his death, he would hope that Christians would intervene to save his life."

Q Does the article identify Mr. Cadle as one of the leaders of the IMPACT training?

A Let's see. It seems to me it says, "Bruce Cadle, Operation Rescue Southeastern Director and coordinator of the IMPACT Team stated pro-lifers should read the Bible, believing that the power of prayer and the word of God is a powerful weapon."

MR. CADLE: I would again like to say this is hearsay. There is no author to this article. We have no one here representing this publication or representing himself as having authored it.

MR. D'ALEMBERTE: Your Honor, this is offered for the limited purpose of just showing information that's come to the clinic.

Obviously Mr. Cadle didn't make these remarks. These remarks were not made under oath. He can say under oath he did not make these remarks. These are not his sentiments.

[p. 52] At this point it is information from an appropriate source in a pro-life magazine which included Mr. Cadle in the leadership of the IMPACT Team. And, that's just all.

It doesn't end the case. It merely demonstrates information that's been available in a magazine friendly to from Mr. Cadle's cause.

THE COURT: Well, the evidence code I think informs us concerning reputation is an exception to the hearsay rule. But –

MR. D'ALEMBERTE: Your Honor, let me make a suggestion. Why don't I just mark this magazine as an exhibit for identification and we'll confer with Mr. Cadle and if he's going to testify, we'll cross-examine. If he's not, we'll call him as an adverse witness in just a moment. We'll not offer this at this time.

THE COURT: All right. Thank you.

Q Okay. I'm sorry. What was that number again?

A V.

Q Now, additionally you received copies of letters?

A Yes, we have.

[p. 53] Q. Let me show you some and ask you if you can identify approximately when you received copies of these letters and if you will identify in each case the author of the letter, first of all a letter marked – Please give me the identification number on that.

A It looks like JJ.

MR. D'ALEMBERTE: JJ, Your Honor.

Q And, when did you receive that, first of all?

A This letter is dated April 13, 1992. And, I cannot tell you precisely when it was received in the clinic. Generally when these types of letters or [sic] returned to the clinic by the people who received them, it's within several weeks of their having gotten it at their home.

Q Who is the author of that letter?

A This is authored by Meridth Raney.

Q Okay. And, now let me show you Plaintiffs' Exhibit RR and ask you can if you can identify that?

A This is a letter that is signed by Bruce Cadle, Director of Operation Goliath. And, there is not a date on this letter. It discusses, in one paragraph it says, "Well, right now in April 1992," and it goes on. So, I can assume from that this [p. 54] letter was authored in about that time.

MR. WEISS: Your Honor, it predates the entry of your order. I think it's irrelevant and immaterial and it certainly shouldn't be introduced. You know, it was in April.

THE COURT: It hasn't been offered in.

MR. D'ALEMBERTE: Your Honor, I would offer it now. And, it does, indeed, predate the September 30, 1992 order. It does not, however, predate the injunctive order in this case.

Your Honor entered an injunctive order, I believe, in October. The twenty-fifth is the date that sticks in my mind, of 1991. And, that was a temporary injunction which basically had the same language as the final injunction.

This is a letter which was written after the temporary injunction was entered. So, the idea of somehow limiting the evidence after September 30 of 1992, it seems to me is not correct.

If the parties have been violating the injunctive orders of this court and we've just learned of it, we're entitled to put on evidence relating to violations of injunctive orders.

MR. D'ALEMBERTE: I'm sorry I can't get the [p. 55] date.

THE COURT: Your dates, it is going to be right.

THE COURT: I know the temporary injunction was entered by the Court on the twenty-fifth of October of 1991. It's 4:20 p.m.

It addresses itself to a trespassing on instead of blocking and obstructing ingress at a facility where abortions are performed or family planning services are provided in Brevard and Seminole counties and surrounding counties.

MR. WEISS: Your Honor, it was generally modified to focus on, it narrowed the jurisdiction of this county, to two counties, Seminole and Brevard.

MR. D'ALEMBERTE: Your Honor, I think counsel will probably stipulate it has not been since that time been any abandonment of the injunctive orders that have been in place in this case since October of 1991 forward.

THE COURT: All right.

MR. CADLE: Your Honor, my objection is the admission of these articles is because the motion before the Court today is, as I understand it, is the emergency motion that [p. 56] relates to the permanent injunction action since September thirtieth.

The exact wording on line sixteen, page two, paragraph three in its permanent injunction, paragraph four since the permanent injunction was entered there have been violations. The punishment requested the sanctions, requested Your Honor deal specifically with asking the Court to find that the defendants did individually and collectively violate the terms of the Court's permanent injunction. That injunction since September thirtieth of 1992.

Therefore, my understanding of the motion that is actually before the Court today is that it deals with the permanent injunction. The actions claimed are actions after September thirthieth [sic] of 1992.

I would rule that these items from April of 1991, I believe, or 1992 have absolutely no relevance in this case.

THE COURT: It may have, if you dispute your relationship with the organizations that you tender in your letter of April ninety-two, it is somewhat some proof of that relationship.

[p. 57] But, I don't know what your position is yet because I haven't heard it. I'll have to reserve on it, counsel.

MR. D'ALEMBERTE: And, this letter does say Bruce Cadle comma Director Operation Goliath.

THE COURT: I understand. What I'm saying is if he disputes that then it becomes admissible.

MR. D'ALEMBERTE: Your Honor, may I offer this at this time?

THE COURT: No. I'll have to reserve.

MR. D'ALEMBERTE: All right, sir.

Q Let me now, if I may show you Exhibit, Plaintiffs' Exhibit W for Identification, a leaflet and ask you if you can identify when that came to the attention of the clinic?

A This was brought to the clinic by a person who attended one of the Friday evening rallies that have been sponsored and put together by the IMPACT program of Operation Rescue National.

Q What's the date on that?

MR. WEISS: Your Honor, at this time we've got to have a person. We've got to. This is the wildest form of hearsay. Somebody goes – where is this person who got it? He got it from [p. 58] where? Where was it.

This witness is not competent to testify to any of that.

MR. D'ALEMBERTE: All we can show, Your Honor, is literature in circulation that bears the organization's name. They're organizations of the defendants. And, we think we're entitled to show that this information is being published that's in the organization's name.

If that organization denies it's their material, then we obviously would love to have more specifics to show that denial is not –

THE COURT: For that, sustain the objection. The fact it is relayed by this witness. Somebody else got it from this particular place within the jurisdiction of this court, I gather.

MR. D'ALEMBERTE: Yes, sir.

THE COURT: So, it is hearsay.

MR. D'ALEMBERTE: Your Honor, may I then just to conclude just to make sure we've got it on the record the identification of earlier material that's been received and all of this, I think, would fit within same category of objection at least to have an identification on [p. 59] the record? May I?

THE COURT: Do you intend to inquire of other witnesses?

MR. D'ALEMBERTE: Yes, sir. Just that I wanted to establish the chain that it actually reached the clinic.

THE COURT: All right.

Q Let me show you Plaintiffs' Exhibit X and ask you if you can identify that as material that was received at the clinic and if so approximately the time of when it was received.

A Yes. This flier about the IMPACT Team training was received at the Aware Woman Clinic sometime in December.

THE COURT: The exhibit designation of the flier?

THE WITNESS: X.

THE COURT: It's a pamphlet? A leaflet?

THE WITNESS: It's a letter with a registration blank to come to the training. It also includes photographs and bios [sic] of some of the trainers including Bruce Cadle and Keith Tucci and others.

It has a housing application for IMPACT Team members and a copy of the brochure. It's a [p. 60] trifold

brochure that was circulated asking for people to join IMPACT.

THE COURT: This is dated when please?

THE WITNESS: There is not a date on this communication at all. But, it appears to be –

Q The dates for the school, however, are they not in that material?

A The dates for the school are here.

Q And, for the Florida school?

A The Florida school is January eighteenth through April ninth.

Q This year?

A This year. I'm sorry. 1993. It also indicates the dates of the next IMPACT training in June of 1993.

And, lastly there is a page of a letter signed by Reverend Keith Tucci, the executive director of Operation Rescue National.

THE COURT: How did you come by it, please?

THE WITNESS: This was received at Aware Woman Clinic through the mail.

THE COURT: Go ahead, counsel.

Q I'm still just identifying. I next give you Plaintiffs Exhibit AA, alpha, alpha, Your Honor, has the letterhead of Operation Rescue in bold, under [p. 61] that Florida IMPACT, and ask you if that document came to the clinic?

A This document did come to the clinic. It's dated February 16, 1993. It's a letter signed by both Keith Tucci,

the executive director of Operation Rescue National and Bruce Cadle the field director of Operation Rescue National.

And, attached to it is the Florida IMPACT News, Operation Rescue National. It appears to be a one page newsletter. The newsletter is dated February 1993 and it's volume one, issue one.

MR. D'ALEMBERTE: All right, Your Honor. If Mr. Cadle has no objection to that document, I would like to offer it into evidence. And, this is one entitled Operation Rescue with IMPACT identified on the document.

MR. CADLE: My objection, Your Honor, is that this document is, in fact, from an organization called Operation Recue [sic] National. The word "national" appearing across the top of the letterhead. The newsletter attached is also from Operation Rescue National, which is not a named defendant in this procedure.

My objection will be this is a document from a totally separate organization, not a [p. 62] named defendant called before the Court under this action.

MR. D'ALEMBERTE: And, has the signature, Your Honor, of Bruce Cadle, field director Operation Rescue National.

THE COURT: It's relevant to Mr. Cadle's activities. The court will receive it. Okay.

THE CLERK: It will be Plaintiffs' Number Four.

Q Now, if I may show you Plaintiffs' Exhibit CC, Charlie Charlie, Your Honor, for identification, and ask you if that document was received at the clinic?

A Yes, it was.

Q Do you know approximately when it was received?

A No, I don't. It indicates it's signed by Bruce Cadle. And, in the body of the letter it states, "I am currently serving as director of the Pro-Life Action Ministries, Director of Operation Goliath and board member of Sheparding Home Ministries. My activities basically involve overseeing a variety of pro-life activities, such as sidewalk counseling, picketing residences –

MR. WEISS: Your Honor, she is publishing a [p. 63] letter that hasn't been introduced into evidence.

MR. D'ALEMBERTE: I think that's correct, Your Honor. If I can just indicate that publication is for the purpose of identifying this.

THE WITNESS: Yes.

MR. D'ALEMBERTE: And, for no other purpose at this stage, counsel.

THE COURT: I've got to relate it to time, if it's possible.

MR. D'ALEMBERTE: We're going to have to get Mr. Cadle to respond to that I think, Your Honor. And, I'll just save that to when we put Mr. Cadle on.

MR. CADLE: Your Honor, in fact, I object to this document in that it predates even the beginning of

this Court's proceedings rather than the temporary restraining order or –

THE COURT: Again, I need that from the witness stand.

MR. D'ALEMBERTE: And, with that, Your Honor, just one moment. Okay. That's all I have, Your Honor.

THE COURT: We need a recess at this time. [p. 64] We've been at it about an hour and forty minutes. We'll be in recess about ten minutes.

(Whereupon, a brief recess was held, after which the following proceedings were had:)

WHEREUPON:

The following proceedings were had:

THE COURT: Counsel, my research during the recess indicates that Section 90.902 of the Evidence Code indicates that extrinsic evidence of authenticity as a condition precedent to admissibility is not required for among other things printed materials purporting to be newspapers or periodicals.

So, that maybe in part the – the Plaintiff has met his predicate for admissibility that magazine. It may still be a hearsay problem with it. But, authenticity of it is apparently something that need not be established.

Okay. You may inquire.

CROSS-EXAMINATION

BY MR. WEISS:

Q Ms. Arick, my name is Chris Weiss. I'm here as attorney for the Reverend Ed Martin, Judy Madsen, and Shirley Hobbs and the organization Rescue America.

[p. 65] In the videotape that you went through, on the days in question, no one was charged with trespassing on, sitting in, blocking or obstructing ingress into or egress from the facility; were they?

A I'm not sure if the ticket that was written is a form of arrest. I don't know how the police categorize that. But, there was no one taken away in a police car. No.

Q And, you said back years ago, eighty-two, when folks peaceably chained themselves to the front of the door of the clinic, you remember those events as being relatively peaceful? They would go limp and the police would come in. That's when they were blocking the acces [sic] to the clinic. You personally observed that; didn't you?

A I have seen that be relatively peaceful, yes.

Q You never saw a single person chain themselves to a door, block egress to the building, you know, in the classic way with bicycles or chains. You never saw that occur in any time from September 30, 1992 to present?

A Not on property, no.

Q Okay. Now, did you ever see the Reverend Ed Martin instruct anyone in your presence to [p. 66] trespass on or sit in or block or obstruct the ingress or egress to Aware Woman Clinic?

A No.

Q Did you ever here [sic] the Reverend EdMartin –

MR. D'ALEMBERTE: I' [sic] sorry to interrupt you, counsel. Perhaps we can shorten this. I'll stipulate she has no testimony on any violations on behalf of any of your three clients. And, I thought that would speed it somewhat.

MR. WEISS: It sure will. I'll sit down.

THE COURT: Thank you. He enumerated more than three.

MR. D'ALEMBERTE: Your Honor, let's recap this morning. I pointed out to the Court –

THE COURT: I need to understand what you mean by his three clients. Operation Rescue was cited –

MR. D'ALEMBERTE: Rescue America. She has no testimony concerning Rescue America; is that right.

THE WITNESS: Yes.

MR. D'ALEMBERTE: Since September 30, 1992.

THE COURT: And, nothing involving the named individuals.

[p. 67] MR. D'ALEMBERTE: She does not, that's right. No. Not on the no videotape. And, there's nothing relating to the two ladies. We had nothing to present on any of them.

There is nothing relating to the Reverend Martin either on videotape or in her testimony and nothing other than the documents which are identified as having been received and not yet been admitted into evidence.

So, therefore, there is no testimony or other evidence on that subject either. So, it is four, Your Honor, I see, rather than three.

THE COURT: Mr. Weiss, what organizations do you represent?

MR. WEISS: Rescue America. It's an unincorporated association headed by that gentlemen right there. Ed Martin.

THE COURT: Okay. Mr. Cadle, do you wish to inquire?

MR. CADLE: Yes, Your Honor.

CROSS-EXAMINATION

BY MR. CADLE:

Q Ms. Arick, I would like to go through the video in the sequence in which we observed the three different segments that I would like to discuss with [p. 68] you. I believe the first was on March sixth.

MR. CADLE: Your Honor, I apologize for approaching the bench.

THE COURT: I have no problem with that.

Q Let me ask you, if you could, Ms. Arick, this is – I can't see that?

A 8:06 a.m., March sixth.

Q March sixth, 8:06. You previously discussed people walking in a circular motion as being pro-life demonstrators. Is that correct?

A That is correct.

Q And, where did that circular motion take place on?

A From, we don't have the other map, from an area of the east end of the fence in the front all the way across the driveway area and back.

Q And, back. And, at any time during these protests in which it would appear there's possibly hundreds of individual out there, is there a mixture of pro-life and pro-abortion individuals walking in the same lines together or standing side by side on these public right-of-way areas?

A There has been.

Q There has been a mixture?

A Yes.

[p. 69] Q So, it would be difficult for you from this video to identify individually who is a pro-abortion individual, who is a pro-life individual?

A Actually it's very easy because the pro-choice folks have always had signs with them.

Q Have always had signs? There's never been any pro-choice individuals in front of Aware Woman without a sign?

A That I have observed. You asked me about the circular marching. And, when there has been a mixture, I have never observed a pro-choice person without a sign.

Q Okay. Have you observed in other areas around Aware Woman, perhaps on U. S. One, perhaps across the

street, in any of these other areas, have you observed a mixture of pro-choice individuals and pro-life individuals?

A Yes.

Q So, there is often times a mixture of those individuals?

A Yes.

Q You described a pro-choice line, I believe. Could you explain what that pro-choice line is or what that means?

A As I pointed out on the video, it is a [p. 70] single line of pro-choice people stretching across the driveway area to block any of the demonstrators from trespassing on the property or trying to rush –

Q Could you explain where it is on this video?

A Right here. It's a terrible freeze. This is the line of people right here.

Q This is a pro-choice line?

A It is.

Q Individuals with Aware Woman?

A It is.

Q They're extending across the driveway?

A Yes.

Q Is there a difference in where they are standing and where the pro-life individuals across the drive are standing?

A In what way?

Q I'm asking, I see a crowd of people. Can you explain which are the pro-choice or which are the pro-life individuals across that driveway?

A Yes, I can. The pro-choice people have their feet on the – to the north of the line painted on the driveway that is the property line.

Q All right. Do you have any idea who is the driver of this vehicle or any of their relationship [p. 71] to Aware Woman –

A No, I don't.

Q – Center for Choice? You have no idea if they were a patient. You have no idea who they were.

A No. I do not.

Q When we heard the audio portions of this video, could you explain what we're hearing there?

A As I said earlier those are pro-choice supporters chanting to drown out the anti-choice noise.

Q Could you explain to me what those chants might be that would be common on the days such as this?

A That was said, "What do we want? Choice. When do we want it? Now."

Q Now, there are similar chants? There is a lot of noise throughout the day?

A "Separate the church and state" is what you are hearing now.

Q That would be a pro-choice individual chanting in the background?

A Yes, it is.

Q Again, these are pro-choice individuals chanting?

[p. 72] A Yes, it is.

Q Do you have any idea who's using that whistle?

A No. I don't. I saw the person with it. She's a woman. I don't know her.

Q Was she on the pro-choice side of the line?

A Yes. She was.

Q A pro-choice individual –

A Yes.

Q – blowing the whistle?

A Uh-huh.

Q Could you describe for us –

A It's their response to the screaming.

Q Could you describe –

A I'm sorry.

Q Could you describe the time?

A It's 9:22 a.m., sorry.

Q I really can't see those numbers?

A You can't see and I can't hear.

Q So, we're an hour later?

A Yes.

Q The noise that we're hearing now, do you know if those are pro-choice individuals?

A It is a mixture because you can hear "mom" being screamed very loudly by the woman that we know [p. 73] to be named Jane, part of what we believe is the IMPACT Team. The response from the pro-choice people is to drown that out.

Q Are there pro-choice individuals across the street? We see a variety of people across the street. Could there be pro-choice individuals across the street?

A I have noticed a few pro-choice folks wander across the street. I have not seen large numbers.

Q And, we passed rapidly by seeing a car with a potato in the exhaust pipe.

A Uh-huh.

Q You did refer to it. Is that across the street?

A It was in the empty lot across the street.

Q Across from Aware Woman?

A Across Dixie Way.

Q Across Dixie Way. During this day you testified that you were inside the building. We saw a white board a minute ago. Let me interrupt, just a minute, the video.

This vehicle that we see, do you have any idea whose vehicle that is?

A No, I don't.

[p. 74] Q Do you have any idea if that was a patient attempting to enter?

A It certainly could have been. Patients were scheduled that day.

Q But, you have no idea?

A I do not.

Q No factual knowledge?

A I do not.

Q If this is someone seeking services at Aware Woman?

A No, I do not.

Q You referred to this white board and names being placed upon and your discussion with a significant other whose name was on this white board.

How many times during the day of March sixth were you inside the building at Aware Woman?

A Half dozen at least.

Q Half a dozen at least. What would be the average – What would be the average purpose of your going inside, the average purpose?

A Things like using the restroom, to talk to the young man whose name was on that board, to escort a traumatized, weeping patient into the building and have a moment or two with her.

[p. 75] The length of time rarely exceeded two, three, four, five minutes. My focus during these demonstrations is the outside activities.

Q Now, we're about to see what you described as a crowd scene with a man you've described as Randall Terry. Am I in this scene at all to your knowledge?

A Well –

Q I understand it's difficult to –

A I don't see you at this time.

Q Could you describe the sign behind Mr. Terry's head? If the Court would excuse the language that I believe is on there?

A Abortion God is the –

Q The hot pink sign that was being held previously, if we could rewind that. I believe it followed Mr. Terry.

A It says Randall Terry sucks.

Q Would you assume that could be a pro-choice individual's sign?

A I would assume so.

Q So, this crowd that we are seeing could be a mixture of pro-choice and pro-life?

A We know that at least one of those people [p. 76] is not a follower of Randall Terry's.

Q I would agree. Would you also say that – what percentage of this crowd that we' re seeing is media. Just an estimate.

A Well, I see at least half a dozen media people around here. So, depending on how large the shot is, you're looking at least half a dozen media.

Q At least a half dozen media people and one individual we recognize as not being a follower of Mr. Terry's.

You identified this scene earlier as a driveway?

A Yes.

Q Where were you when this scene was taking place?

A I was in the grass directly east of the driveway.

Q And, how long – We see here a "Keep abortion legal" sign. Would I also assume that that's a pro-choice individual?

A We could assume that, yes.

Q And, in fact, other than a few signs that may indicate, we have no idea who these people and if they are pro-life or pro-choice in this general crowd?

[p. 77] A It is very difficult to establish who these folks are without being able to freeze and look very closely.

Q So, if this is, in fact, in the driveway which, from my recollection of this portion of the video, we never see the ground from my recollection of the camera angle. Would it be safe to assume that this is a mutual blocking, if this is a blocking of the driveway, this is a mutual blocking?

There's media. There's pro-life individuals. There's pro-choice individuals. There's a whole crowd in there. Are they all in the same basic area doing basically the same thing?

A Well, we can assume there are a large number of people here whose identity is a mixture. We can always assume that if Randall Terry and this group were not present that the pro-choice people would not be there either.

Q Do you have any idea, was he having a conversation with someone? You were standing to the side?

A It appears that he was, in fact, at that time. Eleanor Smeal (phonetic) was on the property.

Q Identify Eleanor Smeal?

A She is the president of the Feminist [p. 78] Majority Foundation.

Q Of which you, I believe you said you were affiliated?

A I am.

Q Was she standing in the driveway area at this time?

A She was standing very near where I was. She could have been on the grass, could have been on the driveway. It would have been very close. It's difficult for me to give you an exact –

Q I believe, if we can rewind just a moment. I believe previously you identified – That's fine. – in the scene at 10:16 coming up you identified me?

A That is you.

Q I agree. Where were you when that video was taken? Do you have a recollection?

A There where many times when I was near the man with the boom box. Now, you obviously don't see me there. I don't see me in that picture. So, it is impossible for me to say that I was standing right there.

Q Do you have a recollection you were many times near the man with the boom box?

A Uh-huh.

[p. 79] Q Do you have a recollection as to where he was? Was he stationary? Did he tend to walk?

A He stayed in the proximity of the fence that is mid way on the property where the pampas grass is and to the east of that fence. That white map helps a lot with that.

MR. CADLE: Could we use that map once again, Your Honor, Exhibit A for Identification?

A He stayed primary – I'm sorry. He stayed in this area, along this area and down into this staff parking area. He rarely got past the parking, the pavement of the parking area. He was exclusively in this area.

Q So, he was not, to your knowledge, any where near the driveway that you've been previously describing.

A I did not see him there, no.

Q Do you believe that the video that you just showed me was in driveway then?

A No. I do not.

Q Do you believe it was done somewhere in the center –

A Yes.

Q – of the property?

[p. 80] A Yes.

Q So, this video does not show footage of me in or near the driveway?

A I have not noticed you in the driveway on this particular video.

Q Okay. Now, Ms. Arick, again we see vehicles leaving. Do you have any knowledge as to the owner operator or passenger of that particular vehicle?

A No. I don't.

Q Do you have any knowledge if anyone has been permanently detained from access to their vehicle because any individual blocking the driveway of Aware Woman Center for Choice in Melbourne?

A There have been phone calls from patients who had appointments scheduled into the clinic and when they drove by the congestion and fear that they could not get in the driveway passed the clinic and called back to reschedule their appointment to another time.

Permanently detained or not, detained on that given day, absolutely.

Q Do you have the names of any of those individuals?

A No. I don't.

[p. 81] Q To your knowledge on this day, March sixth –

A This is 12:41 p.m.

Q – or any time during that day was I charged with trespassing on, sitting in, blocking or obstructing, ingress into or egress from Aware Woman Center for Choice?

A You were not that I know of.

Q To your knowledge was I charged with physically abusing persons entering, leaving, working, or using any of the services at Aware Woman Center for Choice?

A Not that I know of.

Q To your knowledge was I charged with attempting or directing others to take any of those prior actions?

A You were directing others. But, no one was charged with any of those acts.

Q No one was charged with any of these actions?

A That's correct.

Q When you say no one was charged with any of those actions, would that include Randall Terry?

A To the best of my knowledge, he was charged with nothing.

[p. 82] Q With nothing. Would that include Reverend Pat Mahoney?

A To the best of my knowledge Pat Mahoney wasn't there that day.

Q Wasn't there that day. Okay. To the best of your knowledge was Reverend Ed Martin charged with any of those crimes?

A Not to the best of my knowledge. No.

Q Nor was Judy Madsen or Shirley Hobbs?

MR. D'ALEMBERTE: That's been stipulated.

Q All right. Are we – If we could fast forward to the next segment then, which, I believe was 3:13?

I believe the next segment was identified as being on Highway A-One-A in front of a condominium complex.

A Yes.

Q So, again just for the record, you said the only time I was identified in that video, to the best of your knowledge, I was no where near the driveway or the streets?

A On the scanning that we have done, I have seen you only in that place.

Q Thank you. And, Ms. Arick, I believe at 9:57, so we should just about be there where you [p. 83] identified me in this video?

A I identified you. I'm not sure of the time. We'll see it soon.

Q Can you turn up the volume. How would you describe the activities of these individuals? Were you physically present?

A I was. These individuals were generally quiet, carried no signs, and stayed in the area next to the highway that is public access.

Q The access area that's next to the highway, A-One-A? I believe this maybe the portion where you identified me?

A That's you.

Q And, do you agree I am also next to the highway?

A Yes.

Q Standing silently?

A Yes.

Q To the best of your knowledge, was I charged that day with blocking ingress or egress to any driveway, obstructing traffic?

A Not to the best of my knowledge.

Q To the best of your knowledge, were any of the defendants?

A Not that I am aware.

[p. 84] Q In fact, to the best of your knowledge, are any of the other named defendants present in this video?

A I am not aware of the actual connection of Pat Mahoney to Operation Rescue, so, and some of the others who are marching here. So, it's difficult for me to answer that.

Q Okay. And, this is indicative of the entire activity that day? People walking, silently, praying?

A Except for the time that, I believe, you and Keith Tucci clustered people into small groups at the end and then left the premises.

Q And, that activity I don't believe is on the video-tape?

A No.

Q Could you describe that activity?

A The two of you gathered people into groups of six, eight, or ten. And, it appeared that there [sic] purpose was to stand in small groups and pray and then people left to get in their vehicles.

Q Okay. Was that also near the highway similar to –

A In the same area.

Q To the same area you said we clustered into [p. 85] small groups and appeared to pray?

A Yes. At your direction.

Q All right. If we could fast forward on to the third segment of the video which, I believe, goes back in time to February twentieth.

While we're waiting for that, Ms. Arick, in front of Aware Woman Clinic we've seen a variety of activities. Related to the editing of these videos we hear single individuals from the pro-life group speaking, talking, talking loudly, yelling.

We hear the chanting and noise, group coordinated noises, as you've testified as appear to come from the pro-choice side.

Is there a time where there is group activity of the pro-life side? Is there singing by the pro-lifers?

A There is.

Q Is that a typical thing during these Saturday demonstrations that there might be a group of pro-life individuals singing together?

A Upon occasion.

Q Upon occasion. Is there reason why none of that shows up in this video footage?

A We did not construct something that was too time consuming for this proceeding.

[p. 86] Q Is there – You've described prayer activity which was also not – You were a firsthand witness to prayer activity, but it's not on the video. Is there sometime group prayer activity by the pro-life individuals out on the sidewalk area?

A There is.

Q And, is there a reason why that is not visible in any of these videos?

A Again, in the interest of time we were looking for the kinds of activities that seemed to be some of the most menacing and harassing.

Q Do you recollect from viewing this third segment ever identifying me in this segment?

A I do not recollect in this particular piece you being there, however, this is only a snippet from the day.

Q Which you chose as being indicative of that day's activities?

A Yes.

Q As far as your editorial decision –

A Yes.

Q – in this footage in which I'm not present, to the best of your knowledge on February 20, 1993, was I

charged with trespassing on, sitting in, blocking or obstructing ingress into or egress [p. 87] from the Aware Woman Center for Choice?

A Not that I've been made aware of.

Q To the best of your knowledge was I charged with physically abusing persons entering, leaving, working, or using any of the services of Aware Woman Center for Choice?

A Not that I've been made aware of.

Q To the best of your knowledge, was I charged with attempting or directing others to do any of those previously mentioned acts?

A Again, your direction has not been to have people arrested.

Q Has not been to have people arrested?

A Yeah.

Q Could you tell the Court, you've been involved in some way in the abortion movement or abortion industry since 19 – Was it seventy-six originally up north?

A 1976.

Q 1982 in Central Florida?

A That's correct.

Q Were there any reasons, other than time constraints, why you have left out every aspect of pro-life singing and of pro-life prayer of those types of activities in front of Aware Woman?

[p. 88] A Those activities are not the threatening, menacing activities that the clinics are concerned with.

Q So, you are not concerned out on the public right-of-way area in front of Aware Woman with having prolifers pray or sing peacefully on the public sidewalk there where you mentioned I was earlier? You are not concerned about that as a threat?

A We're concerned about obstruction, about people blocking ingress and egress, people getting in and out of the facility, and people being threatened, harassed, and intimidated.

Q You mentioned earlier some individuals making statements directly to you relating to God striking you dead or Jesus striking you dead?

A Yes.

Q Do you believe in God or do you believe in Jesus?

MR. D'ALEMBERTE: Your Honor, I think I would interpose an objection to that. It has no relevance to this cause.

MR. CADLE: Your Honor, her specific statement was that threats were related to God or Jesus doing these acts. Not that any individual, not that any group, not that any [p. 89] named defendant would ever participate in those acts, but people were praying that God or Jesus would do those things.

I'm curious to see if that was stated as a threat. I'm curious to see if she has a belief in those entities to see, in fact, if she feels threatened by God or Jesus.

MR. D'ALEMBERTE: Your Honor, if a person is there on the scene as the alleged instrument of God then says we want God to strike you dead, that seems to be not only terribly threatening but reminds me of some instances that occurred in other places in this state with in this month.

It's – Her personal beliefs have nothing to do with the threat as it was given.

MR. WEISS: Your Honor –

MR. D'ALEMBERTE: So far as I know, none of this relates to Mr. Weiss' clients.

THE COURT: I don't know. Ordinarily that type of acquiry is not permitted. Conceivably –

MR. D'ALEMBERTE: Your Honor, may I have a moment with the witness just to inquire about personal sensibilities. That may solve the [p. 90] problem.

THE COURT: All right.

(Whereupon, an informal discussion was held off the record, after which the following proceedings were had:)

MR. D'ALEMBERTE: Your Honor, I withdraw my objection and note that the door is open for him to inquire.

THE COURT: The witness will answer.

A In regard to your question, my answer has two parts. And, the first is that because I have such an extensive background in the abortion profession and have seen the quality of protest, the violence that has been done to abortion clinics, providers, and so on, in the name of God

by anti-choice demonstrators, protestors [sic] and so on, I have a genuine fear of the zealotry of some in your ranks.

As regard to my personal belief, yes, I am a member of a church. And, in fact, I do have a belief in God.

Q And, do you also have a belief in Jesus?

A I know him to be a historical figure and I know him to be the central figure in the Christian religion, yes.

[p. 91] Q Do you feel threatened in any way that your life might be ended by Jesus Christ?

A I feel threatened that my life might be ended by an anti-abortion radical in the name of Jesus Christ.

Q Do you feel threatened in any way that God, the God that you believe in, will end your life?

A The God that I believe in is benevolent, a benevolent God, not necessarily the very punative [sic] God that I have heard the people in your ranks refer to.

Q So, when someone says to you that they pray that God would strike you dead or that Jesus would strike you dead, you didn't feel any fear from God or Jesus that you would be struck dead?

A The fear came from those individuals.

Q From those individuals? Which I believe you testified earlier are not any of the individuals that said those things are not defendants or any of the people represented here today?

A Not at this time. No.

Q Not at this time. Is there any reason why the video footage that you edited, that you chose to select did

not show any cars being prohibited from entering into Aware Woman Center for Choice? And, in fact, is there a reason that we don't know who any of [p. 92] these people are?

A Because if a car drove by on the street and did not come into the clinic but slowed in the midst of the crowd, there was not a way at the time for your followers or our pro-choice people to determine whether or not that was a patient.

Many people live in this neighborhood. It's difficult to determine who is in a car that might slow and proceed on past.

Q Do you have any objections to any car driving on Dixie Way voluntarily stopping and receiving literature from a pro-life counseler [sic]?

A It depends on the context of the rest of the area. It depends on whether or not there would be a demonstration in process.

Q So, if there was a demonstration in process and a car voluntarily decides to stop and receive literature from a pro-life counseler [sic], you would object to that?

A Obviously I would have no control over that. My concern would be for public safety in the streets and for traffic problems.

Q And, those are areas outside of Aware Woman Clinic that you are relating to?

A I have no control over those areas.

[p. 93] MR. CADLE: I have no further questions.

REDIRECT-EXAMINATION

BY MR. D'ALEMBERTE:

Q You indicated that on the videotape itself you did not have Mr. Cadle standing in driveway. Do you know where he was standing at the time that the videotape was taken?

A All of the segments or just the ones –

Q The ones that he pointed out to you as you went through. I believe that was on –

A March sixth was the day that we had so much driveway footage on that tape. On March sixth Mr. Cadle was at times in the driveway, at times on the sidewalk area and other parts of the clinic. At times he was down on Highway One. Mr. Cadle was very mobile.

Q Okay. And, on the days of demonstrations since the beginning of this year, have you at times seen Mr. Cadle in the driveway?

A Absolutely. And, in fact, there was a piece of video which we elected not to put on this edited format which showed Mr. Cadle in the driveway directing people in the driveway area.

Q All right. Now, you've indicated that some patients called the clinic and indicated they had [p. 94] come, found it difficult to come into Dixie Way and into the clinic facilities. Can tell us approximately –

MR. WEISS: That's going to be hearsay.

MR. D'ALEMBERTE: Your Honor, I respectfully submit that here is a clinic employee who receives information from someone who has a scheduled appointment, that has broken the scheduled appointment. She has knowledge she receives that, but not that their broken appointments – I think I am entitled to inquire as to what her knowledge is of those broken appointments.

MR. WEISS: Judge, this goes right to the heart of the matter.

MR. D'ALEMBERTE: Your Honor, I also point out that all this testimony is not something that relates to Mr. Weiss' clients. He has no standing to make an objection.

MR. WEISS: As an officer of the court I certainly have a right to object to the wildest form of hearsay that goes to the heart of this issue.

Where is the person? Where is the woman who was impaired to go in? Where is that [p. 95] person.

And, I submit this hearsay goes right to the heart of the issue. It's an attempt to prove by an out of court statement the truth of the allegations that patients have complained.

It is the wildest form of hearsay.

MR. D'ALEMBERTE: Communication directly with to this client breaking – with this witness breaking an appointment. And, she received the information herself, Your Honor.

THE COURT: It's not clear whether she received it or others received it.

MR. WEISS: I think that's correct.

MR. D'ALEMBERTE: Reported to her. I stand corrected, Your Honor. And, I'm not positive myself honestly.

THE COURT: Could you tell us whether or not you received calls personally or whether it was related to you by others?

THE WITNESS: I did not receive them personally. Others who are performing reception duties would field those calls as they come in. And, I gained knowledge of that during staff meetings at the end of a particular day.

MR. CADLE: I would then hereby move it's [p. 96] hearsay and be stricken from the record.

THE COURT: Sustain the objection.

Q As a consultant to the clinic –

THE COURT: Grant the motion to strike.

Q As a consultant to the clinic, were you able to determine, did you have access to the records of appointments to the clinic?

A Yes.

Q Were you able to examine those records?

A Yes.

Q Were you able to determine whether or not an unusual number of appointments were canceled on the days of the IMPACT demonstrations?

A Yes.

Q Were they?

A In fact, yes. And, among the canceled include people who do not call to say I'm not coming in. That's called someone who doesn't show up for appointments. Those numbers are increased as well as the cancellations.

Q Okay. Now, there was some testimony about a mixture of people in the roadway and in the demonstrations. Given the present climate of activities at the clinic, do you see any danger in that mixture of the various forces?

[p. 97] A I'm concerned for several reasons. One is, and in one part of the video there, we tried to stop and freeze. It's difficult to see. There is a car that entered the driveway. It is slowed out in the street as it very slowly makes its way to the driveway.

And, there is a person who is keeping it from entering quicker. It is a toddler held by the hand by one of the anti-choice demonstrators.

So, this very slow braking and moving of people in front of the driveway I fear is going to create a real public safety hazard. I'm afraid someone probably is going get run over in the street in driveway.

Additionally because there is not a separation of the pro-choice and the anti-choice groups, I fear that the police are going to be less able to stop confrontations if they might occur without any distances between them.

MR. D'ALEMBERTE: Thank you, Your Honor.

THE COURT: Mr. Cadle?

MR. CADLE: Yes, Your Honor.

RECROSS-EXAMINATION

BY MR. CADLE:

Q Ms. Arick, you just now testified to [p. 98] somethings [sic] you had not previously testified about my whereabouts at different times. Is there any reason – How many video cameras typically would your side be using on a given day of demonstrations?

A One to three.

Q One to three. Would, in part, the purpose of those video cameras be to collect evidence that might be used in a court proceeding such as this?

A Yes.

Q As the individual who edited those videos, do you personally give instruction or do you know that instruction is given to the operators of these cameras what to do, who to look for in their videography?

A If [sic] fact, I know that instruction to date has not been given. Therefore, the quality of what we have been able to bring specifically dealing with your presence is not what I would like.

Q So, you have hours, I believe you described earlier six or eight hours of collective video. Is it also true there is a stationary video camera on the premises of Aware Woman looking down over the driveway area at all times?

A It is.

Q And, is that recorded on the videotape?

[p. 99] A It is.

Q Could you describe for the Court the elevation of that particular camera?

A It's on a flag pole twenty, twenty-five feet above the ground.

Q So nothing would likely obstruct its view of the driveway area?

A Correct.

Q And, is it focused at the driveway area?

A It is.

Q Is there any reason why you did not bring any footage from that video camera showing me ever in the driveway at Aware Woman Center for Choice?

A Yes, there is. The reason is that it only films at night.

Q Is that a peculiarity that this particular camera can't film during the day?

A It's not used during the day. It's a security camera for nighttime.

Q And, you described my whereabouts – the areas that you were describing, you said I was rather mobile. Were those areas that you were describing in the public areas of the right-of-way?

A They were.

Q And, not on the property of the Aware Woman [p. 100] Clinic?

A They were not.

Q And, you mentioned that a number of appointments decreasing on the days of these demonstrations. Is it accurate that you also said that some of those people just never called? They never showed up. And, you have no reason why they may not have come.

A Yes. Initially. However, each of those people were contacted afterward to find out why they failed to show for an appointment.

Q Do you have the name of any individual that says that they had failed to show up because of having their ingress or egress blocked into the driveway?

A No. I don't.

MR. CADLE: Okay. No further questions, Your Honor.

THE COURT: All right. It's 12:16. We'll recess for lunch until 1:30 when you can call your next witness.

MR. D'ALEMBERTE: Your Honor, one technical problem, I don't think we actually marked the videotape as an exhibit entered or identified as accepted into evidence. I think that it might [p. 101] need a number we can refer to for the record.

THE COURT: All right. It was previously admitted into evidence. It's been placed in evidence. Let's mark it as what number?

THE CLERK: Plaintiffs' Number Five.

(Whereupon, the Court was recessed at 12:20 o'clock p.m.)

[p. 102] CERTIFICATE OF REPORTER

STATE OF FLORIDA :
:
COUNTY OF ORANGE :

I, Margie L. Breit, Notary Public for the State of Florida at Large, do hereby certify that the within-named proceedings were by me reduced to shorthand; afterwards transcribed by me; that the foregoing is a true and correct transcription of the proceedings as aforesaid

I do further certify that I am not a relative, counsel, or attorney for either party or otherwise interested in the event of this action

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my seal of office on February 5, 1994 in Orlando, Florida.

/s/ Margie L. Breit
MARGIE L. BREIT

My Commission Expires:
October 7, 1994
Commission No.: CC 053127

[p. 1] IN THE CIRCUIT COURT OF THE EIGHTEENTH JUDICIAL CIRCUIT IN AND FOR SEMINOLE COUNTY, FLORIDA
CASE NO: 91-2811-CA

WOMEN'S HEALTH CENTER, INC., AWARE WOMAN CENTER FOR CHOICE, INC., EPOC CLINIC, INC., AND CENTRAL FLORIDA WOMEN'S HEALTH ORGANIZATION, INC.,

Petitioners.

vs.

OPERATION RESCUE, OPERATION RESCUE AMERICA, OPERATION GOLIATH, ED MARTIN, BRUCE CADLE, PAT MAHONEY, RANDALL TERRY, JUDY MADSEN, AND SHIRLEY HOBBS,

Respondents.
_____/

BEFORE THE HONORABLE
ROBERT B. MCGREGOR
JUDGE OF THE COURT

A hearing in the above-styled cause was held at 9:30 o'clock a.m., on Friday, the 2nd day of April, 1993, in the courtroom of the Seminole County Courthouse, Sanford, Florida, before Margie L. Breit, Notary Public for the State of Florida at Large.

[p. 2] APPEARANCES:

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HEARING HELD APRIL 2, 1993

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[p. 3] WHEREUPON:

The following proceedings were had:

PAULA SUE WYMER

a witness herein, having first been duly sworn, was examined and testified as follows:

DIRECT-EXAMINATION

BY MR. CADLE:

Q Mrs. Wymer, would you state your name and place of residence for the record, please?

A Paula Sue Wymer, 240 Pike (phonetic) Street, Palm Bay, Florida.

Q Mrs. Wymer, I'm going to ask you a series of questions that relate to a time frame beginning September thirtieth of 1992 up until – to the present time.

It was on September thirtieth of 1992 this Court granted a permanent injunction related to activities outside of any facility that performs abortions in Brevard or Seminole Counties.

In that time frame have you had occasion to be present in front of Aware Woman Center for Choice?

A Yes, I have.

[p. 4] Q Have you had occasion to be there on a regular basis?

A Uh-huh.

Q Could you describe the type of frequency perhaps?

A Okay. Yes, I have. The frequency would be probably three out of four Saturdays a month. Did you ask why? I'm sorry.

Q No. No. Just the frequency. Have I ever invited you or ever encourgaged [sic] you to come to Aware Woman?

A Yes, you have.

Q Have you come as a result of those invitations or that encouragement?

A Yes. In part.

Q Would you describe the activities that you have participated in after coming to Aware Woman?

A Okay. I come out of my personal sense of conviction and, in part, I come because Bruce has invited me. But, I come to obey my Lord and Savior, to obey a higher law.

I come to pray firstly, and pray for, first of all, that babies would not be killed that day.

I truly believe that the moment a baby is conceived he or she is a human being. I feel [p. 5] strongly about this. And, I feel prayer is the first and foremost thing that we're called to do as Christians.

I don't believe that is done in the church alone. I don't believe it happens within the walls. I believe we have to go to the killing centers, I believe, to make our presence known to the girls that come seeking what they think is counseling, seeking what they think is help. And, I think we need to be there as a way to say there is another choice.

I come also to sing, to be a part of a church that doesn't happen within walls, the true church. I come to be a part of a church that comes from different faiths. We are the church when we're there.

You sense the Lord's presence in a different and special way. We come to sing. We don't shout. We don't yell. I do not participate in those things. And, essentially that's what we're doing there. That's what I'm doing.

Q When you come and you sing, when you pray and you participate in this worship, are you doing this on public right-of-way or where does this take place?

A Yes, we are. We're doing it, unfortunately [p. 6] we're doing it in the street because the police had barricaded public right-of-way to us in Melbourne. We are not allowed to go from a certain point in time. We were in the street doing this. But, we never once went across the public right-of-way or past those barricades.

Q Have you ever observed me present during some of those times when you've been on the public right-of-way area?

A Yes, I have.

Q And, what type of activities have you seen me engage in?

A Praying, first and foremost, leading in the singing, discussing with police officers, pleading with police offices to uphold what we know is the law, speaking with other people among the group.

Q Would you say that you have typically seen me in the sidewalk area? In the driveway area?

A Typically on the sidewalk area or outside in the street actually.

Q Some of the charges the plaintiffs related to me, Mrs. Wymer, they are attempting to find me in contempt of this court order which prohibits me from the following acts, trespassing on, sitting in, blocking or obstructing ingress to or egress from any [p. 7] facilities at which abortions are performed in Brevard or Seminole Counties.

Since September thirtieth of 1992 have you observed me do any of those things?

A No, I have not.

Q The next thing that is enjoined by the Court is physically abusing persons entering, leaving working, or using any services of any facilities at which abortions are performed in Brevard or Seminole County, Florida.

Have you seen me physically abuse any persons?

A Absolutely not.

Q Have you seen me attempt to do any of the things I've just stated?

A No.

Q Have you seen me direct others to do any of those things –

A Absolutely not?

A [sic] – I've just stated. Okay. Mrs. Wymer, one of the direct allegations is that I have been on site at the clinic participating in activities which violated the injunction against those things that I just read you.

Have you seen me engaged in harassing [p. 8] activities designed to obstruct ingress in or egress from the clinic. They described demonstrators swarming around cars, attempting to trap people inside. Have you seen anything like that happen?

A Absolutely not.

Q Have you seen me attempt to do anything like that?

A No.

Q Or strike anyone?

A Never.

Q Mrs. Wymer, do you have any plans to trespass on or sit in, block ingress or egress into any facility at which abortions are performed in Brevard or Seminole County?

A No.

Q You plan to physically abuse people entering, leaving, or working in or using any services or any facilities in which abortions are performed in Brevard and Seminole County?

A No. I do not.

Q Do you have any plans to attempt to do those?

A No.

Q To direct or to do those things?

A No.

[p. 9] MR. CADLE: No further questions, Your Honor.

CROSS-EXAMINATION

BY MR. WEISS:

Q Hi. Do you know reverend Ed Martin? Could you pick him out of a crowd?

A No. I could not.

MR. WEISS: Nothing further, Your Honor.

CROSS-EXAMINATION

BY MS. PATRICK:

Q Mrs. Wymer, I want to see if I understood your testimony correctly. Since the injunction was entered in court you have come to the Aware Woman, I think, three out of four Saturdays a month?

A Approximately, yes.

Q You have come at the invitation of Bruce Cadle at that time; right?

A In part, yes.

Q In part because Mr. Cadle has called and invited you to come?

A Not always.

Q The majority of the time?

A No.

Q He has not called?

A What do you mean call?

[p. 10] Q I'm sorry. I assumed he made an invitation by telephone. If I was mistaken –

A No.

Q Why don't you tell me how he makes an invitation known to you?

A We're close friends, so we communicate through, I mean, just talking.

Q Okay. How often does Mr. Cadle talk to you and invite you to come to the clinic?

A How often?

Q Yes.

A Probably weekly.

Q All right. So, Mr. Cadle talks to you weekly to invite you to come to the clinic; is that right?

A Yes.

Q And, when you get to the clinic do you see Mr. Cadle there?

A Yes.

Q You see him lead others in singing?

A Uh-huh.

Q Do you see him discussing matters with police officers?

A Occasionally.

Q And, when you see him doing that, is it – [p. 11] What is your understanding of why he's doing that? Is he

acting on behalf of you, all of you that are there, talking, interceding for you with the police?

A I would imagine so.

Q All right.

A I'm not close enough to see what he is speaking about. But, I think alot of the time it's to make sure that we know what the police are there for.

Q All right.

A And, what the boundries [sic] are.

Q When he comes to talk to you and the others with you after speaking to the police, do you and the others to whom he speaks obey his instructions?

A Maybe I'm being misunderstood. He doesn't come and more or less relay what the police are saying. He's there, I would say, as an emissary.

Q All right. An emissary on behalf of the demonstrators or people praying and walking, counselors to the police?

A Occasionally, yes.

Q Do you perceive Mr. Cadle as a leader?

A Yes. I would say so.

Q Do you perceive him as a leader of the movement called Operation Rescue?

[p. 12] A That's – That's his job. Yes.

Q Are you also an adherent to Operation Rescue?

A Yes. I am.

Q Are you taking IMPACT training?

A No, I'm not.

Q Have you attended any IMPACT training courses?

A No.

Q On the days when you are at the clinic you said that you did not shout?

A No. No. I have not shouted.

Q Have you seen other pro-life demonstrators, though, that shout while you are present at the clinic?

A Yes. And, may I explain why?

Q I'll ask you questions. I'm sure if –

A No. I would like to explain why.

Q No.

A There is a reason –.

THE COURT: You weren't asked why. You have to answer only the questions as posed. And, again Mr. Cadle presumbly, if he would like you to do that, he will ask you that.

THE WITNESS: Okay.

[p. 13] Q Now, one of the reasons that you are all there, I believe you said, is because you are there to be part of the true church. Is that right?

A Yes.

Q And, the people who are there are there to display the strong feelings that they have about abortions?

A Wrong.

Q Right?

A Wrong. We are not displaying our feelings. We're there because of what we believe, God has said something, not our feelings.

Q You are there –

A It's much deeper than that.

Q I don't mean any disrespect to your faith, ma'am. If you are there to –

A Okay. I am there because I have definite convictions and feelings.

Q All right. So, you are there to display your convictions about abortion?

A No. I wouldn't say I'm there to display it. I think I'm there so that women know there is a choice. There is a different –

Q All right. And, you and the others who are there are there, I believe you said, to display that [p. 14] you are part of the true church?

A Yes.

Q And, that God calls you to obey a higher law?

A Yes.

Q All right. Do you pray for God's judgment on Aware Woman and the people who work there?

A Not primarily, no.

Q Do you ever pray for it?

A Yes.

Q How many times have you prayed for God's judgment on Aware Woman and the people who work there?

A I would have to no idea.

Q What do you mean when you say that? What do you look for? What do you want to happen when you pray for God's judgment on Aware Woman?

A I would not use that word or those words, God's judgment. I would – I would say that I pray that women that come would know the truth. And, I don't believe the truth is being told. I don't believe that there is an opportunity for truth to be told.

And, that's the reason sidewalk counselors are not able to be giving information. There is a [p. 15] band against truth. And, so that's what I pray.

Q Mrs. Wymer, I don't think I misheard you. I think you said you have on occasion prayed for God's judgment on Aware Woman and the people that work there?

A What do you mean by God's judgment?

Q Well, you understood judgment and acknowledged you had some idea what I was talking about. I would with like for you to tell the Court candidly what you mean by praying for God's judgment on the people who work at abortion clinics?

A I just did.

Q Do you pray that Aware Woman will go out of business?

A Yes, I do.

Q Do you pray that the people who work there will not come to work?

A Yes. Occasionally I do for their sakes and not only for the girls that come.

Q Have you ever heard people there in the demonstrations call down God's judgment on Ted Wendell?

A No.

Q Have you ever heard anyone call down God's judgment on the people who work at the clinic?

[p. 16] A Yes.

Q Have you called God's judgment on the clinic?

A No.

Q Do you know what – God's judgment, you read about that in the Bible?

A Yes, I do.

Q What does it mean?

A I would say God's judgment would mean he upholds his law.

Q How would he do that?

A I would have no idea. He does it in differemt [sic] ways. Each circumstance is different. But, god's law is

always being upheld whether man believes it or not or acknowledges whether it exists.

Q And, one of your jobs as a Christian is to obey God's higher law. Is that right?

A Yes.

Q And, if the law, if God's higher law caused you to come on the property of a clinic, you would do that; wouldn't you?

A Yes. I would.

Q If God's law called you to violate the Court's orders, you would do that; wouldn't you?

A Yes, I would.

[p. 17] Q And, do you believe that the people who are there demonstrating with you share your convictions about abortions, of obeying God's higher law as opposed to the law of man?

A Yes. But I would have no idea how that manifests itself in their lives. I can only speak for myself.

Q The people with who you share your convictions about abortions obey the higher – God's higher law rather than the law of man?

A Yes. When it conflicts with man's law.

Q And, as you sit here today God's higher law conflicts with man's law in Florida which permits abortion? You believe that; don't you?

A Restate your question.

Q You believe that God's law conflicts with the laws of the State of Florida that permits abortions?

A Yes, I do.

Q So, you are going to obey God's law when it comes to matters of abortion and the women that want to them have them?

MS. PATRICK: Thank you. I have nothing further.

THE COURT: Mr. Cadle, any further inquiry?

[p. 18] MR. CADLE: Just briefly, Your Honor.

REDIRECT-EXAMINATION

BY MR. CADLE:

Q Mrs. Wymer, you described that you have not participated in shouting, but that you have witnessed people shouting. Would you describe what you've witnessed?

A Yes, I would. On more than one occasion, in fact, more often than not, loud music is played from the boundries [sic] within the Clinic so that the girls that arrive in cars and are escorted in with umbrellas, with all manner of clocking are not able to hear what the sidewalk counselors would like to give them. They're not able to stop their car, roll down their window on public property and take the literature that would show them what's going on that would give them the truth to make a decision.

And, so occasionally and like I said, more often than not when loud music, when yelling and screaming from pro-aborts is done in our faces, most of the time in our ears, within inches of our faces screaming is being done at that point in time, yes.

There have been people, sidewalk counselors especially that have to raise their voices and shout to be heard so that girls that are getting out of [p. 19] their cars, walking into the clinic can actually hear that there is going to be some truth before they go in. They can't say they hadn't heard something.

Q Mrs. Wymer there is confusion over the question of your prayers and praying for judgment. Have you prayed anything else related to the Wendells?

A Yes, I have. I don't only pray for what you would want to call God's judgment, but I believe at a certain point in time, I would hope that it's sooner than later for the Wendells, but that God will allow their hardened hearts to be opened and be able to see the truth.

Q And, so do you pray for similar things for the other employees that work at Aware Woman?

A Yes. When I say truth, let me qualify that. I don't mean truth about the abortion issue or truth about rights. I'm talking about God's truth and the acceptance of him and what that entails.

Q Is it your desire that through your prayers to see the Wendells saved or judged?

A Saved.

MR. CADLE: No further questions, Your Honor.

THE COURT: Any further inquiry.

[p. 20] MS. PATRICK: No, sir.

THE COURT: All right. Thank you.

[p. 21] CERTIFICATE OF REPORTER

STATE OF FLORIDA :

COUNTY OF ORANGE :

I, Margie L. Breit, Notary Public for the State of Florida at Large, do hereby certify that the within-named witness was first duly sworn to testify the truth, the whole truth, and nothing but the truth; that the testimony then given by her was by me reduced to shorthand in the presence of the witness; afterwards transcribed by me; that the foregoing is a true and correct transcription of the testimony so given by her as aforesaid.

I do further certify that I am not a relative, counsel, or attorney for either party or otherwise interested in the event of this action.

IN WITNESS WHEREOF, I have hereunto set may hand and affixed my seal of office on February 7, 1994 in Orlando, Florida.

/s/ Margie L. Breit
MARGIE L. BREIT

Notary Public – State of Florida
My Commission Expires:
October 7, 1994
Commission No.: CC 053127

Supreme Court, U.S.
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No. 93-880

IN THE

Supreme Court of the United States

October Term, 1993

JUDY MADSEN, ED MARTIN, AND SHIRLEY HOBBS,
Petitioners,

v.

WOMEN'S HEALTH CENTER, INC., AWARE WOMAN CENTER FOR CHOICE, INC., EPOC CLINIC, INC., and CENTRAL FLORIDA WOMEN'S HEALTH ORGANIZATION, INC.,
Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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QUESTIONS PRESENTED FOR REVIEW

1. Whether an injunction designed to protect workers and patients at a medical facility from conduct that inhibits access to that facility and creates health risks for individuals undergoing sensitive medical procedures is a valid time, place and manner regulation under the First Amendment.

2. Whether an injunction restricting only unprotected activity should be struck down as overbroad because its terms might be read literally to reach some protected expression.

3. Whether an injunction's detailed provisions, read in light of previous unprotected activity that prompted the injunction, must be voided for vagueness.

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IN THE

Supreme Court of the United States

October Term, 1993

No. 93-880

JUDY MADSEN, ED MARTIN, AND SHIRLEY HOBBS,
Petitioners,

v.

WOMEN'S HEALTH CENTER, INC.,
AWARE WOMAN CENTER FOR CHOICE, INC.,
EPOC CLINIC, INC., and CENTRAL FLORIDA
WOMEN'S HEALTH ORGANIZATION, INC.,
Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

BRIEF FOR RESPONDENTS

STATEMENT OF THE CASE

This case involves a sustained effort by anti-abortion forces to shut down the only women's health clinic in Brevard County, Florida, the Aware Woman Center for Choice in Melbourne ("Clinic"). The campaign against Aware Woman and other abortion clinics in Central Florida began in 1991. Rescue America sent out a leaflet announcing the arrival of Operation Rescue-National in Central Florida. R. 9-10. Petitioners Madsen, Martin and Hobbs, who are officers of Rescue America, were identified as the persons to call for more information about Operation Rescue's activities in Florida. R. 9.

In 1991, when activities directed toward the Clinic became too disruptive, the Clinic brought this action, which resulted in entry of a temporary injunction in 1991 followed by a permanent injunction on September 30, 1992. The 1992 injunction was based on findings that "[Petitioners] are individuals and organizations, acting in

concert, who have planned a nationwide campaign which they call 'OPERATION RESCUE' . . . directed towards closing down abortion clinics and providers throughout the country," J.A. 6.,[1] and that the Petitioner Ed Martin had "stated an intent to prevent persons from having abortions in the Brevard and Seminole County areas by blocking access to clinics." The Court found that Petitioner Martin had issued a press release which "announces an 'Operation Rescue' for Central Florida." J.A. 7.[2]

Based on its conclusion that the protesters threatened the Clinic's prospective business relationships with clients "seeking access to abortion, gynecological and other family planning services," the threats to property interests, and the threat of interference with the patient's right of choice guaranteed by the Florida Constitution, J.A. 7, 8 (¶¶ 1-2), the court concluded it should issue an injunction to protect the clinic from the obstruction of ingress and egress, physical abuse of staff and patients and the directing of others to engage in these activities. J.A. 9 (¶¶ A 1-3).[3]

Entry of the September 1992 injunction did not lead the protesters to respect the rights of the Clinic staff or patients; indeed, the activity directed against the Clinic escalated after this court order. Throughout the rest of 1992, the Rescue America newsletter, written by Petitioners Martin and Madsen, J.A. 414-15, continued to urge "rescue" activity, which was defined in this publication:

[1] Citations to the Joint Appendix will appear with the notation "J.A.;" citations to the appendix accompanying the Petition for Writ of Certiorari will be shown as "Cert. Pet. App.," and citations to the full Record on Appeal will appear with the notation "R."

[2] The Petitioners have attempted to distance themselves from Operation Rescue and the protesters who have disrupted the Clinic (Petitioners' Brief 3, 44, "Petitioners are not members of Operation Rescue . . . ," Petitioners' Brief 7), but the record is not in question. In its 1992 order, the court found that Petitioners Ed Martin, Judy Madsen and Shirley Hobbs are members of Operation Rescue, J.A. 6 (¶¶ 2, 4).

[3] The Petitioners state that they do not challenge this order. Petitioners' Brief 8, 43. The 1992 injunction was appealed by the Petitioners and was affirmed by Florida's Fifth District Court of Appeal on December 17, 1993 (Case No. 92-2684).

> The term rescue refers to blockikng [sic] access to the entrance of abortion clinics. . . . In most cases, the clinic is shut for the day. Many appointments do not reschedule.

J.A. 109, 413.[4]

In the months following the September 1992 injunction, the Clinic suffered a December 1992 butyric acid attack; the Clinic doors were disabled with super glue, J.A. 246-247; the doctor serving the Clinic received threats including a mock shooting,[5] J.A. 54, 191; false statements were made about the medical staff, J.A. 215; and focused residential picketing against the Clinic staff continued, J.A. 498.

In January 1993, there was a greater escalation of activity with the arrival of the "IMPACT" Team. J.A. 247.[6] This increase in

[4] Paragraph 2 of the Stipulation executed by the Petitioners prior to the September 1992 Injunction, R. 64, stated:

> Operation Rescue America, Ed Martin, Judy Madsen and Shirley Hobbs are active in an organization known as "Operation Rescue America," (hereinafter referred to as "Operation"). In other areas of the United States, this effort has been directed toward closing down abortion clinics throughout the country to save unborn children. [Petitioners'] desire is to close down "abortion mills" by various means. Operation Rescue America, Ed Martin, Judy Madsen and Shirley Hobbs well understand that peacefully blocking access to the facilities might constitute a trespass that is punishable by criminal penalties. They feel a violation of such a criminal statute is justified by their belief that protection of the unborn may merit breaking the criminal trespass laws. R. 64-65.

[5] On this occasion, Dr. Snydle was followed as he left the Clinic by Meredith Raney, a member of the Operation Rescue IMPACT Team. J.A. 189. Raney sped down U.S. Highway 1 after Dr. Snydle. J.A. 190. When Dr. Snydle pulled off the road, Raney pulled up next to him. J.A. 54, 191. Raney rolled down the window, made his hand into the shape of a gun, grinned and pretended to shoot Dr. Snydle. J.A. 54, 191.

[6] "IMPACT" is the "Institute of Mobilized Prophetic Activated Christian Training," J.A. 41, and it was a nationally recruited group designed to "Help equip, train and lead these groups into true spiritual warfare." J.A. 41. The use of military terms pervades the literature of the protesters. Terms like "weapon," "battle" and "warfare" are typical. *Id.*

activity included a range of new tactics directed against the Clinic. J.A. 256-57, 274-75. The number of protesters who came to the Clinic increased, J.A. 268; the Clinic's phone lines were systematically tied up, J.A. 55 (¶ 2); theft increased, J.A. 273; targeted residential picketing was intensified, J.A. 509; and access to the Clinic was made more difficult, J.A. 271.

In March of 1993, the Clinic was under siege. As many as four hundred protesters crowded the narrow residential street[7] which provided the only access to the Clinic. J.A. 51, 262, 291, 293. They moved in a steady stream across the Clinic driveway. J.A. 534, 542. Their presence caused cars entering the Clinic property to slow or stop entirely. J.A. 51, 266, 542. As the cars slowed, a cadre of protesters swarmed around them, shoving literature into the cars' windows and, pressing close to the cars, screaming invective. J.A. 265, 266, 542.

On the flanks of the Clinic property, others propped ladders against the Clinic's 8-foot privacy fence, shouting at patients and staff and holding up signs above the fences which carried the names of patients and of their companions. J.A. 53, 538, 542. One stood on a ladder and shouted over the fence at a Clinic employee, "Ruth, Ruth, I pray that God strikes you dead. In the name of Jesus, I pray Jesus strikes you dead. I pray for your death in the name of Jesus." J.A. 556.

Faced with escalation of the activity directed against the Clinic, its patients and its staff, the Clinic returned to court and sought an amended injunction which would spell out with clarity the bounds of demonstrators' activity which interfered with Clinic access and which would address the many new techniques of stalking and harassment which arrived along with the IMPACT Team.

The amended injunction granted to the Clinic catalogues episodes of unlawful, disruptive and harassing activities at the Aware Woman Clinic. When the Clinic's physician, Dr. Frank Snydle, attempted to

[7] The street, Dixie Way, is 21 feet 4 inches wide, and the public right-of-way on either side is around 14 feet. J.A. 65.

reach the Clinic, protesters, including Petitioner Ed Martin, blocked the path of his car. J.A. 193, 200, 211. On another occasion, Bruce Cadle (Operation Rescue's Southeast Regional Director and coordinator of the IMPACT Team) and his followers surrounded the doctor's car, screaming "Baby Killer" and "We don't want you here in Melbourne." J.A. 54. The noise level was intense.[8] On many other occasions, patients were simply turned away by the crowd in the driveway. J.A. 54, 154, 590. These patients were denied medical care, J.A. 590, and their delay in obtaining surgery increased their health risks, J.A. 155.[9]

Patients had their names, or their companions' names, inscribed onto poster boards that were then held aloft from the tops of ladders thrust over the Clinic's privacy fence so that people on the Clinic grounds would know that the protesters were able to identify them. J.A. 53, 538, 542. Patients were stalked. J.A. 55 (¶ 3).

Physicians and staff were made to fear for their lives. Two of them, the Clinic's physician, Dr. Frank Snydle, and a nurse, Pamela Doyle, were so terrified that they quit their jobs. J.A. 55, 140, 521. In February of 1993, J.A. 171, Dr. Snydle was made the target of an attack at a hotel, The Comfort Inn, where he had stopped to rest for the night, J.A. 173. Inside the hotel, a phalanx of six to seven protesters cornered the doctor in the hotel lobby. J.A. 174. The activists approached the doctor and standing within a foot of him, screamed "child murderer" and "baby killer." J.A. 53, 177. Though forced to leave the hotel lobby, the protesters returned minutes later to confront Dr. Snydle in the coffee shop, taking his picture and calling him a child murderer. J.A. 178-179. As a result of this episode, Dr. Snydle was unable to reach the Clinic at his

[8] The noise outside the Clinic was audible inside the Clinic and, importantly, could be heard even inside the Clinic's operating room.

[9] Petitioners' simply misrepresent the record when they assert, baldly, that "[t]here is no evidence that any woman was prevented from obtaining an abortion." Petitioners' Brief 6. The Petitioners do correctly quote from the Eleventh Circuit opinion in *Cheffer v. McGregor*, 6 F.3d 705, 711 (11th Cir. 1993), but *Cheffer* was in error. *See infra* note 21.

scheduled time. J.A. 54, 179. After Dr. David Gunn was murdered by an anti-abortion activist in Pensacola, Dr. Snydle quit working at the Aware Woman Clinic. J.A. 55, 196-199.

Nurse Doyle, the single mother of three daughters, quit her job because she and her children were the target of focused residential picketing at her apartment complex. J.A. 492-521. Eventually, however, she returned to work. In December of 1992 — after the first injunction — the protesters, led by Cadle, returned to Doyle's home on a Sunday afternoon. J.A. 501. A group of thirty shouted at cars and residents, thrusting leaflets about Nurse Doyle into the hands of those who tried to enter the complex. J.A. 502.

In February 1993, events escalated further when a group of protesters accosted Doyle's children who were home alone while she was at work. J.A. 504-507. Doyle's children, aged fifteen, eleven and nine, were at home awaiting the arrival of their grandparents.[10] Hearing a knock at the door, the nine year old child opened it. J.A. 506. A group of fifteen protesters stood outside Doyle's home, J.A. 505, 507, and two of the activists were at the door, J.A. 506. They told the children that they "wanted to convince them to convince their mother not to work at Aware Woman and stop killing babies." J.A. 507. One of the children called her mother at work, crying, and Doyle raced home to find "three terrified little girls." J.A. 505-506. Doyle moved the next day and made "arrangements" for her children.[11] J. A. 514. She testified that it was a struggle, every day, for her to go to work. J.A. 515.

The activity directed at the Melbourne Clinic after the September 1992 injunction, and particularly after the campaign of the IMPACT Team began in January 1993, was different in tone and intensity from

[10] Nurse Doyle's parents were coming to help her daughters pack and move. Doyle and her family were moving because she felt her family "needed to find a safe place that provided some sense of security, someplace if they did find us that at least it would not be invisible to the public." J.A. 506.

[11] Doyle wrote letters to each of her daughters because "I felt that in case one day I'm at work and the clinic is gone for some reason that bodily harm was done, [and] I wasn't here, I wanted them to know why and how I felt." J.A. 514-15.

the earlier protest activities.[12] Capt. Allgeyer of the Melbourne police testified to the intensification of the activities, J.A. 247, the growth of the crowds, J.A. 257, their overflow into the street, J.A. 264, the protesters' disregard for police warnings about the dangers of being in the street, J.A. 265, the tactics of blocking the cars, J.A. 266, and a more intense manner of the protesters. J.A. 268.

Many of these activities by the protesters were captured on a videotape of events on February 20 and March 6, 1993. The videotape, Plaintiffs' Exhibit 6, which has been lodged with the Court. J.A. 107, was presented to the trial court through the testimony of Ruth Arick and her testimony references the date and time of the videotaped images. Her testimony narrates scenes of cars being blocked, J.A. 534, 536, the display of signs over the privacy fence, J.A. 538, 542, 553, a defendants' press conference held in the very driveway of the Clinic, J.A. 544, shouting and threats, J.A. 548, and screaming at the Clinic, J.A. 552.

It was against this background of increased blocking of access and constant harassment of the Clinic employees and patients that Judge McGregor was called upon to determine the appropriate judicial response. The original injunction had not been effective in protecting the rights of the Aware Woman Clinic, its patients and staff. Although prohibited to do so, Petitioner Martin, and others acting in concert with him, were blocking access to the Clinic by obstructing the driveways.[13] Petitioners were also blocking access to the Clinic by harassing staff members in their homes in order to deter them from going to work or, in the case of Pam Doyle, to require

[12] Ruth Arick, a Clinic worker, testified: "I've seen a difference in the quality of demonstrations beginning about the first of 1993 . .. the protestors [sic] have gone to very directly and personally threatening the staff." J.A. 554. *See also* J.A. 199, 556.

[13] There is no evidence that anyone, patient or staff member, ever arrived at the Clinic by any means other than a car. The Clinic is located in the northern-most part of Melbourne and is not accessible by public transportation.

to require her to leave work to protect her children. J.A. 505. The Clinic's situation had become so desperate that the local police captain, Gary Allgeyer, testified that enforcement of the injunction would help the police maintain public order and safety,[14] J.A. 299, and that a neutral zone would be helpful to the situation. J.A. 260.

After a three-day contested evidentiary hearing, the court announced its intention to grant the Clinic's motion to modify the permanent injunction and to frame a very specific order. The Amended Permanent Injunction ("Order") entered on April 8, 1993 contained extensive findings. The court found that "despite the injunction of September 30, 1992, there has been interference with ingress to . . . the Aware Woman Clinic . . . ," J.A. 50, and the court described the specific nature of the interference to ingress and egress, a finding based on extensive testimony and videotape of the defendants' activities, J.A. 50-51. The court traced the consequences of this activity, consequences which are quite graphically shown on the videotape introduced into evidence:

> As vehicular traffic approached the area it would, in response to the congestion, slow down. If the destination of such traffic was either of the two parking lots of the petitioners, such traffic slowed even more, sometimes having to momentarily hesitate or stop until persons in the driveway moved out of the way.

Finding A, J.A. 51.

The findings detailed the way the demonstrators approached the vehicles trying to enter the Clinic:

---

[14] Allgeyer also acknowledged that one of the reasons the police had experienced difficulty in maintaining order was because they had been threatened with lawsuits by the protesters. J.A. 250. Melbourne, a small community, lacks the resources to defend such lawsuits — a circumstance that weighed heavily on Allgeyer's mind, J.A. 316, and may have influenced the Melbourne police chief, who decided to give up the entire street to the demonstrators despite the obvious safety hazards and the resulting denial of access to the Clinic. J.A. 280.

> As traffic slowed on Dixie Way and began its turn into the clinic's driveway, the vehicle would be approached by persons designated by the [Petitioners] as sidewalk counselors attempting to get the attention of the vehicles' occupants to give them anti-abortion literature and to urge them not to use the clinic's services. Such so-called sidewalk counselors were assisted in accomplishing their approach to the vehicle by the hesitation or momentary stopping caused by the time needed for the picket line to open up before the vehicle could enter the parking lot.

Finding E, J.A. 52-53.

The court made a particular finding about the fences which protected the Clinic's privacy and the tactics of the protesters who employed ladders to intrude on that privacy:

> The clinic has fences on its west and north side, and persons would occasionally place a ladder on the outside of the fence and position themselves at an elevation above the fence and attempt to communicate by shouting at persons (staff and patients) entering the clinic. On one occasion the communication to a clinic staff person took the form of an attempt to invoke the wrath of God by shouting, "I pray that God strikes you dead now!"

Finding F, J.A. 53.

The court also made specific findings about the practice of residential picketing, including the targeting of the children of Clinic personnel, J.A. 53, and the hounding of Clinic personnel at their homes and even at a motel, J.A. 53-54.

The court found that patients were harassed by the demonstrators who crowded the street and the entranceway to the Clinic:

> This physician also testified that he witnessed the demonstrators running along side of and in front of patients' vehicles, pushing pamphlets in car windows to persons who had not indicated any interest in such literature.

> As a result of patients having to run such a gauntlet, the patients manifested a higher level of anxiety and hypertension causing those patients to need a higher level of sedation to undergo the surgical procedures, thereby increasing the risk associated with such procedures . . . . The doctor also testified that he observed some patients turn away from the crowd in the driveway to return at a later date. He testified that such delay in undergoing the procedures also increased the risk associated therewith.

Finding I, J.A. 54.

The doctor also testified that the noise of singing, chanting, shouting and yelling could be heard through the walls of the Clinic and caused stress in the patients during surgical procedures and while recuperating in the recovery rooms. J.A. 54.

The harassment of the patients, like that of the Clinic personnel, was not limited to the vicinity of the Clinic. The court found:

> That patients and staff are sometimes followed in a stalking manner when they leave the clinic, giving such persons a feeling of great apprehension.

Finding K(3), J.A. 55.

Based on those extensive findings, which in turn were based on extensive evidence, Judge Robert McGregor entered the Order which is partially challenged by Petitioners.[15] The Petitioners appealed the amended permanent injunction and, on joint motion, the case was certified to the Florida Supreme Court as a case of great public importance. The theory Petitioners advanced in the Florida Supreme Court was that the injunctive order was unconstitutional on its face and the Petitioners' record on appeal did not contain a single word of testimony or any of the trial court exhibits.

[15] The Order contains elements not challenged by Petitioners such as the order to law enforcement to place a phone tap on the Clinic's phones so that the phone numbers from which "jamming" of the Clinic's phones could be established.

A unanimous Supreme Court of Florida affirmed the amended injunctive order, noting that the appellants did not "seriously question the technical validity of the amended injunction or the factual findings on which it is based." Pet. Cert. App. A-12. Nonetheless, the Court reviewed the record and found that the trial court's factual findings were supported.

The Petitioners, one of two groups who appealed the amended injunctive order to the Florida appellate courts, sought review by this Court. The Petition for Writ of Certiorari was not opposed by Respondents because of the confusion generated by an intervening decision, *Cheffer v. McGregor*, which was handed down by the Eleventh Circuit. Cert. Pet. App. C. The *Cheffer* case, discussed in footnote 19, was brought by a party not subject to the amended permanent injunction who alleged that she was not acting in concert with the Operation Rescue defendants but who claimed to fear its reach. There was no factual record in *Cheffer*[16] and the Clinic was not a party. Indeed, the Clinic sought to intervene in the Eleventh Circuit proceedings and was denied that privilege. The *Cheffer* opinion, reversing the federal District Judge's dismissal of the complaint, was handed down before the Florida Supreme Court opinion and was acknowledged by the unanimous opinion which affirmed Judge McGregor. Cert. Pet. App. A-25, footnote 10.

SUMMARY OF ARGUMENT

In this case, Petitioners ask this Court to overturn an injunction designed to protect workers and patients at a medical facility from conduct that inhibited access to the Clinic, harassed and threatened people attempting to approach the Clinic, created health risks for individuals undergoing sensitive medical procedures, and blocked traffic on a public roadway. Petitioners' claim is that these activities constitute speech protected by the First Amendment. This claim

[16] In the absence of a factual record, it is curious that the Eleventh Circuit majority stated, "in the instant case, there is no indication in the record that women were actually prevented from obtaining abortions at the Aware Woman Center for Choice." Cert. Pet. App. C-13. Of course, the record in the state trial court did have such evidence. J.A. 50.

cannot be defended under any interpretation of this Court's relevant precedents.

The injunction at issue in this case is a reasonable time, place and manner regulation of Petitioners' activities. The injunction easily satisfies the standard for such regulations set forth in cases such as *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984): The injunction is "justified without reference to the content of the regulated speech, [is] narrowly tailored to serve a significant governmental interest, and . . . leave[s] open ample alternative channels for communication ." Id. at 293.

The injunction satisfies the first part of the *Clark* standard because it regulates Petitioners' conduct, not their speech. Activities such as inhibiting access to medical facilities, blocking roadways, threatening Clinic workers, and intentionally frightening Clinic patients before and during surgery do not constitute expression protected by the First Amendment. Regardless of Petitioners' motivation for their actions, these activities are conduct, not speech, and therefore are subject to reasonable regulations to protect the health, safety and rights of those who wish to use the Clinic's facilities. To the extent that the injunction incidentally regulates Petitioners' expression, the injunction is justified as a content-neutral regulation of the secondary effects of that expression.

The injunction is narrowly tailored because it is drawn carefully to prohibit particular activities that have occurred in the recent past, which have had the effect of inhibiting access to the Clinic by patients and workers. The trial court that issued the injunction was responding to extensive testimony about Petitioners' actions, and also responding to the fact that an earlier, much more general injunction had been completely ineffective in protecting the rights of those seeking the services of the Clinic.

Finally, the injunction permits ample avenues of communication because Petitioners are entirely unrestrained in their activities outside a narrow perimeter around the Clinic and residences of Clinic workers. Petitioners can engage in exactly the same speech today as they could before the injunction was issued. The only difference

is that the Petitioners must now respect the rights of those who wish to seek medical care, or who wish to be left alone in the sanctity of their homes.

Petitioners' argument that the injunction is unconstitutionally overbroad and vague has no merit. Petitioners' overbreadth claim fails because it is nothing more than a claim that the injunction marginally infringes on protected activity. This weak contention is insufficient to satisfy this Court's requirement that an overbreadth claim must include proof that the overbreadth is "not only . . . real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973). The hypothetical examples of protected speech cited by Petitioners do not even approach this standard.

Likewise, anyone of common intelligence will be able to ascertain what conduct is prohibited by this injunction. Petitioners' vagueness claim depends on a hypertechnical and even illogical reading of terms that clearly communicate what is prohibited and what is not.

Petitioners' real complaint is not that the injunction is too vague, but rather that it is all too clear. Petitioners' vagueness claim is part of an effort to reduce the injunction to its previous, ineffective form. Given the Petitioners' past history of violating clear but broad injunctive terms, this Court should recognize the need for clear guidelines protecting the interests of all parties, and uphold this injunction.

ARGUMENT

I.

THE INJUNCTION PROTECTING THE CLINIC IS A LEGITIMATE TIME, PLACE AND MANNER REGULATION OF PETITIONERS' ACTIVITIES

The injunction challenged in this case has the sole purpose of protecting patients at a medical facility from actions that directly restrict

the patients' access to medical care and therefore endanger the patients' health. The injunction was issued after Petitioners refused to obey the more general terms of an earlier injunction issued in September, 1992 and after the trial court heard extensive testimony about the harmful nature of the Petitioners' behavior and the effects this behavior had on patients at the Clinic. The terms of the injunction at issue here are detailed and precise only because the Petitioners' conduct after the issuance of the earlier injunction made it necessary for Judge McGregor to leave no doubt whatsoever about what conduct was impermissible.

The detailed terms of the injunction are specifically tied to Petitioners' conduct, and do not go beyond what is needed to protect the legitimate medical concerns of the Clinic's patients. The injunction does not prohibit any speech, nor does it attempt to regulate any particular ideas. The injunction is addressed to Petitioners' conduct, not their ideas, and it regulates expression only to the extent necessary to prevent the harmful conduct that was abundantly evident in the testimony presented to the court.

The injunction in this case is justified by a substantial body of case law permitting reasonable time, place and manner regulation of speech. *See, e.g., Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989); *Clark v. Community For Creative Non-Violence*, 468 U.S. 288, 293 (1984); *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 795 (1984); *Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 647-48 (1981).[17]

[17] This Court has held that the time, place and manner standard applies to regulations of speech in a public forum. *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983). In the remainder of this brief, Respondents have assumed for the purpose of applying the time, place and manner standard that the short sidewalk outside the Clinic is a public forum. However, the sidewalk in this case closely resembles the sidewalk that a plurality of this Court deemed a non-public forum in *United States v. Kokinda*, 497 U.S. 720 (1990). In this case, the entire sidewalk is a thirty-seven foot strip of concrete four feet wide linking the entrances to the two Clinic parking lots. The sidewalk does not extend east or west beyond either Clinic parking lot, and therefore cannot be used for any purpose other than to go from one parking lot to the other, and then into the Clinic. Thus, this sidewalk is analogous to the sidewalk in *Kokinda*, which "leads only from the parking area to the front door of the post office," and "was constructed solely to assist patrons to negotiate the space between the parking lot and the front door of the post office, not to facilitate the daily commerce and life of the neighborhood or city." *Id.* at 727-28. If this Court finds that the sidewalk outside the Clinic is analogous to the sidewalk in *Kokinda*, regulations of conduct on the sidewalk would be subject to a simple reasonableness test. *Id.* at 730. Because of the strong state interest in protecting the Clinic workers and patients, the provisions of the injunction regulating the protesters' actions on the sidewalk are reasonable and should be upheld.

This Court has held that time, place, and manner regulations are "valid provided that they are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information." *Clark*, 468 U.S. at 293.[18] Each of these requirements is easily satisfied by the injunction in this case.

A. THE INJUNCTION IS NOT DIRECTED AT THE CONTENT OF PETITIONERS' SPEECH.

A regulation of speech is content neutral when it is "justified without reference to the content of the regulated speech." *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976). The injunction in this case is directed at the harmful effects of Petitioners' conduct, not the content of their speech. As the Florida Supreme Court recognized: "The restrictions regulate when, where, and how Operation Rescue may

[18] At one point in their brief, Petitioners argue that the injunction fails the four-part *O'Brien* test applicable to regulations of symbolic speech. *See United States v. O'Brien*, 391 U.S. 367 (1968); Petitioners' Brief 20-21. However, as Petitioners acknowledge, this Court treats the *O'Brien* test as "little, if any different" from the time, place and manner test. *Clark*, 468 U.S. at 298. "Expression, whether oral or written or symbolized by conduct, is subject to reasonable time, place or manner restrictions." *Id.* at 293. Therefore, the conclusion that the injunction at issue in this case satisfies the time, place and manner standard also resolves Petitioners' *O'Brien* claims.

speak, not what it may say. The restrictions make no mention whatsoever of abortion or any other political or social issue; they address only the volume, timing, location, and violent or harassing nature of Operation Rescue's expressive activity." *Operation Rescue v. Women's Health Center, Inc.*, 626 So. 2d 664, 671 (Fla. 1993).

Contrary to the main thrust of Petitioners' brief, the injunction at issue in this case is not "content based" merely because it protects the patients and staff of the Aware Women's Clinic from specific groups or individuals who have deliberately and repeatedly violated the rights of the Clinic's patients and staff. The trial court was not concerned with the particular point of view that motivated the Petitioners. The court was concerned only with the fact that Petitioners and those acting in concert with them had engaged for months in blocking access to the Clinic, harassing and threatening Clinic personnel, and intentionally creating conditions that caused an increased health risks to the Clinic's patients.

Judge McGregor issued the injunction in this case to stop Petitioners and their fellow protesters from doing exactly what they said they would do: "prevent persons from obtaining abortions in the Brevard and Seminole County area by blocking access to clinics." J.A. 6. Because the injunction targeted Petitioners' actions, rather than their beliefs, the injunction does not violate the First Amendment. Although the First Amendment prohibits the state from sanctioning abstract beliefs, it does not prohibit the state from regulating specific harmful conduct simply because the conduct is motivated by abstract beliefs. *See Wisconsin v. Mitchell*, 113 S.Ct. 2194 (1993).

Many federal and state courts have recognized, in circumstances similar to those in this case, that limited injunctive relief protecting the health and safety of abortion clinic patients and workers does not constitute "content based" or "viewpoint based" regulation. As the United States Court of Appeals for the Third Circuit recently observed with regard to a similar injunction:

> [T]he injunction could apply equally to protests which supported abortion as well as to protests which opposed abortion, or indeed, to protests supporting or opposing

> any other cause. It is true that this injunction applies only to [these abortion opponents], but that is because it is only those persons who the Center has proved have created and are continuing to create a threat of violence and intimidation.

Northeast Women's Center, Inc. v. McMonagle, 939 F.2d 57, 63 (3d Cir. 1991).[19]

Petitioners base their claim of content and viewpoint discrimination on an inaccurate description of the injunction's terms and scope. *See* Petitioners' Brief 12 ("The injunction's restriction of pro-life speech and exemption of prochoice speech establishes that it is not viewpoint-neutral.") On the contrary, the terms of the injunction are not limited to persons holding anti-abortion views. The injunction would also apply to any individuals or groups that decided to drive

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[19] *See also New York N.O.W. v. Terry*, 886 F.2d 1339, 1364 (2d Cir. 1989) ("injunction effectuates significant governmental interests in maintaining public safety — controlling traffic on the streets and sidewalks [and] it ensures that the constitutional rights of one group are not sacrificed in the interest of the constitutional rights of another"), *cert. denied*, 495 U.S. 947 (1990); *Medlin v. Palmer*, 874 F.2d 1085, 1090 (5th Cir. 1989) (regulation prohibiting use of amplifiers within 150 feet of medical facilities served governmental interests in protecting patients of hospitals and clinics); *Portland Feminist Women's Health Ctr. v. Advocates for Life, Inc.*, 859 F.2d 681, 686 (9th Cir. 1988) (injunction vindicates significant governmental interest in protecting ability of clinic to provide medical services free from actions that endanger health and safety of patients); *Bering v. SHARE*, 721 P.2d 918, 925 (Wash. 1986) ("Although only anti-abortion picketers are bound by the geographic restriction of picketing, . . . that in itself cannot be viewed as content regulation. The trial court imposed the place restriction in order to regulate the conduct of a particular group of persons before the court."), *cert. dismissed*, 479 U.S. 1050 (1987); *Hirsh v. City of Atlanta*,401 S.E.2d 530, 533 (Ga.), *cert. denied*, 112 S. Ct. 75 (1991) (state has significant interest in protecting health and welfare of its citizens and their right to obtain medical care); *O.B.G.Y.N. Ass'n v. Birthright of Brooklyn and Queens, Inc.*, 407 N.Y.S.2d 903, 905 (N.Y. App. Div. 1978) (injunction against protesters furthers substantial governmental interest in the health or safety of any patient of the medical clinic).

the Clinic out of business for reasons having nothing to do with opposition to abortion rights (for example, as part of an effort to limit commercial development and traffic congestion in the area), if they joined with Petitioners to achieve that goal and engaged in the behavior prohibited by the terms of the injunction.[20] Motives, thoughts, expression, and ideology are all irrelevant in determining whether the injunction applies to a particular individual's behavior; the crucial factor is whether the individual engaged in activities prohibited by the injunction.[21]

[20] Judge McGregor's statements at the April 12, 1993, contempt hearing are not to the contrary. *See* J.A. 71. In these statements, Judge McGregor merely pointed out that the individuals who were arrested for violating the injunction were engaging in fundamentally different behavior than the Clinic workers who were in the same area, but were not arrested. When Judge McGregor told Mr. Lacy that the injunction "did not pertain to those on the other side of the issue," J.A. 71, he was referring to the fact that the people "on the other side of the issue" (that is, the Clinic workers) were not engaging in activity that "continue[s] to impede and obstruct both staff and patients from entering the clinic," which is what the injunction was intended to prevent. J.A. 55. The Judge did not imply, as Petitioners suggest in their brief, *see* Petitioners' Brief 10-11, that the injunction applied to Petitioners because of their substantive views on the subject of abortion rights. In fact, Judge McGregor went out of his way to make it clear that protesters would *not* be convicted for violating the injunction simply because of their views. J.A. 56.

[21] In arguing that the injunction is an unconstitutional content-based regulation of speech, Petitioners rely heavily on *Cheffer v. McGregor*, 6 F.3d 705 (11th Cir. 1993). In *Cheffer*, the Eleventh Circuit reversed a federal District Court's refusal to grant a preliminary injunction against the enforcement of the state court injunction. In its opinion, the Eleventh Circuit asserted that an injunction against Operation Rescue and its adherents was "no more viewpoint-neutral than one restricting the speech of 'the Republican party, the state Republican party, George Bush, Bob Dole, Jack Kemp and all persons acting in concert or participation with them or on their behalf.' " *Cheffer*, 6 F.3d at 711. Like Petitioners' argument, the Eleventh Circuit ignores the obvious fact that even political parties may be required to comply with an injunction if their conduct infringes the legal rights of other citizens. If George Bush, Bob Dole, Jack Kemp, and members of the Republican party had repeatedly blocked the driveway to Democratic National Headquarters and harassed and intimidated its staff members, they (and those acting in concert with them)

In fact, Sections (3) through (9) are nothing more than specific provisions intended to carry out the general prohibition of Sections

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could be enjoined from continuing to do so. The fact that such an injunction would run against political figures is irrelevant for First Amendment purposes because the injunction would be directed at their *conduct*, not their beliefs.

On this and several other points, Petitioners cite *Cheffer* repeatedly to suppor ttheir position in this case. However, the Eleventh Circuit's decision in *Cheffer* contains such an unusual and badly mistaken analysis of federal law that it has virtually no value in analyzing the issues before this Court. The problems begin with the strange holding of the case. The Eleventh Circuit ruled that the District Court's denial of a preliminary injunction against the state court was "founded on a mistake of law." *Id.* at 712. The District Court's "mistake of law" was that it "treated the state court injunction as an ordinary injunction when it had the effect of a criminal statute." *Id.* The Eleventh Circuit did not cite any precedent supporting its conclusion that "the injunction has all the attributes of a criminal statute and we will treat it accordingly." *Id.* at 708. The Court's rationale for this determination was that "[o]n its face, the injunction appears to 'criminalize' various acts of peaceful protest." *Id.* at 707. Since the same would be true of every injunction enforceable by criminal contempt sanctions (which is to say, virtually all injunctions), it is unclear why the Eleventh Circuit found this injunction distinctive. It is also unclear why the Eleventh Circuit held — apparently in the absence of any evidence — that "[i]t is obvious to us that Judge McGregor did not intend the Amended Permanent Injunction to be enforced through the civil contempt process . . . . The injunction clearly attempts to circumvent a civil contempt process that the judge considered too cumbersome." *Id.* at 707 n.2.

Aside from the problematic substantive discussion in *Cheffer*, the Eleventh Circuit should not have reached the merits of the injunction at all. The court reached the merits only by misapplying three major doctrines of federal jurisdiction: standing, ripeness and *Younger* abstention. The Eleventh Circuit held that the plaintiff in the case had standing to "challenge the restrictions placed on her free speech by the Amended Permanent Injunction." *Id.* at 709. The problem with this holding is that Cheffer raised only vague allegations about her own expressive activities, and seems to have claimed at most that the injunction generally chilled her speech. *See id.* at 714 (Paine, J., dissenting). Yet Cheffer also claimed that she was not acting in concert with the Petitioners. *Id.* at 714 (Paine, J., dissenting). Therefore, since she was not subject to the injunction at all, she was a completely disinterested party.

This Court has held that claims of general chilling effect do not satisfy

(1) and (2), whose legitimacy is conceded by Petitioners. *Id.*, Judge McGregor added the more precise provisions to the general ban on blocking access to the Clinic (which had been the main part of the earlier, September 1992 injunction) because the overwhelming weight of the testimony before the court indicated that the earlier general prohibition had failed to achieve its purpose. J.A. 50-55. If Petitioners recognize the content-neutral basis of the original in-

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the ripeness requirement of Article III, *see Laird v. Tatum*, 408 U.S. 1 (1972); *United Public Workers of America v. Mitchell*, 330 U.S. 75 (1947). Nevertheless, the Eleventh Circuit did not even mention the ripeness requirement. This Court has also held that claims as indefinite as Ms. Cheffer's cannot satisfy the imminence and concreteness components of the Article III injury-in-fact standing requirement. *See Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130 (1992); *Valley Forge Christian College v. Americans United*, 454 U.S. 464 (1982). The Eleventh Circuit brushed aside the standing requirement by treating the injunction as a statute infringing on First Amendment rights, and asserted that in such cases, "it is unimportant that Cheffer has alleged that she intends to exercise her own rights to free speech." *Cheffer*, 6 F.3d at 709 n.5.

The Eleventh Circuit's treatment of the *Younger* abstention doctrine is also inconsistent with directly applicable Supreme Court precedent. While the Eleventh Circuit acknowledged that *Younger v. Harris*, 401 U.S. 37 (1971), prohibits federal courts from interfering in state court proceedings, the court held that the *Younger* doctrine did not apply to Cheffer's case because "Cheffer has no remedy in state court except to subject herself to a criminal contempt citation." *Id.* at 709. It is difficult to understand the Eleventh Circuit's logic on this point. If Ms. Cheffer is acting in concert with the Petitioners, then she is covered by the injunction and her interests in challenging the injunction are adequately represented by Petitioners in the state court litigation. *See Hicks v. Miranda*, 422 U.S. 332, 348-49 (1975); *Doran v. Salem Inn*, 422 U.S. 922, 928-29 (1975). On the other hand, if Ms. Cheffer is not acting in concert with the Petitioners, then she is not covered by the injunction and does not have standing to pursue the federal lawsuit seeking to prevent the state courts from enforcing their rulings.

Petitioners can take little solace from an opinion as deeply flawed as *Cheffer*. The fact that Petitioners place such heavy emphasis on the *Cheffer* analysis says a great deal about the strength of their constitutional claims in this case.

junction effective. Both injunctions are justified by the content-neutral objective of "provid[ing] for the protection of the owners, staff and patients of the Clinic and to prevent the further disruption of the operation of the Clinic," J.A. 61, and the detailed provisions of the more recent injunction are narrowly drawn to achieve that purpose. Therefore, all provisions of the injunction easily survive constitutional scrutiny.[22]

1. The Injunction Regulates Petitioners' Conduct, Not Their Ideas.

Petitioners rely heavily on this Court's recent decision in *R.A.V. v. City of St. Paul*, which reaffirmed the general proposition that "[c]ontent-based regulations are presumptively invalid." 112 S. Ct. 2538, 2542 (1992), *see* Petitioners' Brief 8-14. Respondents agree that content-based regulations of speech must receive strict scrutiny, *see Burson v. Freeman*, 112 S. Ct. 1846 (1992), but disagree that the principle is implicated in this case. The very decision cited by Petitioners as establishing the basic rule against content-based regulation of speech also held that the rule does not apply when the regulation addresses harmful conduct, as opposed to ideas. *R.A.V.*, 112 S. Ct. at 2544.

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[22] In their brief, Petitioners suggest that an injunction may not be premised on a time, place and manner rationale. Petitioners' Brief 21-22. They also argue that the injunction in this case is an impermissible prior restraint. Petitioners cite no decision striking down an injunction simply because it is based on a time, place or manner rationale, nor do they explain why the time, place or manner rationale should apply in all regulatory contexts except those involving injunctions. Petitioners also do not cite a single case holding that a narrowly tailored injunction of the sort issued in this case falls within the scope of this Court's prior restraint decisions striking down injunctions addressed to orderly public expression. "It is entirely proper . . . to draw a distinction between injunctive relief imposing time, place and manner restrictions upon a class of persons who have persistently and repeatedly engaged in unlawful conduct, on the one hand, . . . and an injunction that constitutes a naked prior restraint against a proposed march by a group that did not have a similar history of illegal conduct in the jurisdiction where the march was scheduled." *Hirsh v. City of Atlanta*, 495 U.S. 927, 927 (1990) (denial of stay) (Stevens, J. concurring).

This Court elaborated on the speech/content distinction in *Wisconsin v. Mitchell*, 113 S. Ct. 2194 (1993). In *Mitchell*, this Court upheld a Wisconsin statute enhancing penalties for crimes committed against victims selected on account of race, color, disability, sexual orientation, national origin, or ancestry. *Id.* at 2197. This Court held that "whereas the ordinance struck down in *R.A.V.* was explicitly directed at expression (i.e., 'speech' or 'messages') the statute in this case is aimed at conduct unprotected by the First Amendment." *Id.* at 2201 (citation omitted).

Likewise, the injunction in this case regulates conduct such as blocking traffic, J.A. 51, crowding around cars attempting to enter the Clinic parking lot, J.A. 52, 54, forcing patients to "run a gauntlet" in order to obtain medical care, J.A. 54, generating noise sufficiently loud to disturb patients undergoing medical treatment inside the Clinic, J.A. 54, and harassing the minor children of clinic workers, J.A. 53. It is impossible to argue seriously that any of these activities constitutes speech protected by the First Amendment. Like the individual and social harms addressed by Wisconsin's bias statute, the harms addressed by the injunction in this case are completely independent of Petitioners' beliefs. *See id.* at 2201 (state interest not based on "mere disagreement with offenders' beliefs or biases").

The fact that Petitioners' conduct is intended to communicate a message to the Clinic workers and patients does not insulate that conduct from reasonable regulations such as those embodied in the injunction. This Court has rejected "the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." *United States v. O'Brien*, 391 U.S. 367, 376 (1968). Whether or not it is intended to communicate ideas, conduct may be prohibited if it threatens disorder or invades the rights of others. *Tinker v. Des Moines School District*, 393 U.S. 503, 513 (1969). "A group of demonstrators could not insist upon the right to cordon off a street, or entrance to a public building, and allow no one to pass who did not agree to listen to their exhortations." *Cox v. Louisiana*, 379 U.S. 536, 555 (1965). In this case, although there was substantial

evidence that Petitioners fomented disorder and threatened the rights of others, the trial court did not prohibit any of Petitioners' expressive conduct. The injunction issued by the court simply channeled Petitioners' conduct in a manner that reduced its harmful effects. Each section of the injunction is directed at different aspects of Petitioners' behavior, and therefore channels Petitioners' behavior in different ways. This does not violate Petitioners' First Amendment rights because this Court has rejected "the assumption that people who want to propagandize protests or views have a constitutional right to do so whenever and however and wherever they please." *Adderly v. Florida*, 385 U.S. 39, 47-48 (1966).

Section (3) of the injunction prohibits Petitioners and those acting in concert with them from coming within 36 feet of the Clinic. The main effect of this part of the injunction is to place protesters across the street from the Clinic. Just as "two parades cannot march on the same street simultaneously, and government may allow only one," *Grayned v. Rockford*, 408 U.S. 104, 115 (1972), Judge McGregor was justified in placing Clinic workers and patients on one side of Dixie Way, and protesters on the other. Extensive testimony was introduced at the trial concerning harassment of patients and Clinic workers by the protesters, J.A. 283, 542, which caused increased health risks for Clinic patients, J.A. 153, and resulted in other patients being turned away, J.A. 154-155. Based on this testimony, Judge McGregor reached the reasonable conclusion that placing the protesters on the other side of the street from the Clinic was necessary to protect access to the Clinic. This restriction is no different from those statutes, upheld by this Court, that criminalize picketing in a manner that interferes with ingress or egress to a courthouse. *See Cameron v. Johnson*, 390 U.S. 611 (1968); *Cox v. Louisiana*, 379 U.S. 559 (1965).

The other portions of the injunction are also focused on conduct rather than expression. Section (4) of the injunction prohibits Petitioners from making loud noises that can be heard inside the Clinic while medical procedures are taking place. This provision is justified by a long line of cases limiting noise that interferes with the rights of unwilling listeners nearby. *See Ward v. Rock Against Racism*, 491 U.S. 781 (1989); *Grayned v. Rockford*, 408 U.S. 104 (1972); *Kovacs v. Cooper*, 336 U.S. 77 (1949).

For similar reasons, Section (4) of the injunction permissibly restricts "images observable to . . . patients inside the Clinic," in light of testimony that protesters climbed atop the Clinic's fence to post signs with the names of patients and their spouses or companions. J.A. 538. These signs could be seen from inside the Clinic. J.A. 538, 542. The injunction does not ban these images altogether; the injunction simply prohibits placing the images in a location where they will traumatize patients at the time they are undergoing medical treatment. As this Court has held, while the same images would be permissible in other circumstances and in other locations, "[t]he crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time." *Grayned*, 408 U.S. at 116.[23]

Section (5) of the injunction prohibits Petitioners and those acting in concert with them from approaching people within 300 feet of the Clinic unless the target of the speech indicates a desire to communicate. Petitioners inaccurately characterize this provision as a total ban on handbilling. *See* Petitioners' Brief 23. In fact, this provision is a simple traffic regulation, justified by the need to "secure convenient use of the streets by other travelers, and to minimize the risk of disorder." *Cox v. New Hampshire*, 312 U.S. 569, 576 (1941) (upholding conviction for parading without a permit). This portion of the injunction would primarily affect Petitioners' ability to approach cars on U.S. Highway 1, which is the major traffic

[23] In *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789 (1984), this Court approved an ordinance prohibiting the posting of signs on public property as a legitimate means of addressing the "visual assault on the citizens of Los Angeles presented by an accumulation of signs posted on public property." *Id.* at 807. The visual assault addressed by the injunction in this case is much more direct, individualized and potentially harmful than the general and indirect aesthetic harm addressed by the ordinance in *Taxpayers for Vincent*. Also, the remedy here is much narrower than the total ban imposed by Los Angeles on displays on public property. Under the injunction, Petitioners may post their signs anywhere in the City of Melbourne except where they could directly and immediately harm patients undergoing medical procedures. Again, it is the harmful conduct, not the ideas, that is being regulated by this injunction.

artery that must be traveled to reach the residential street on which the Clinic is situated. See J.A. 65. Despite the evident dangers,[24] protesters routinely attempted to approach cars coming to the Clinic on the highway. J.A. 52. This portion of the injunction is therefore justified as a content-neutral safety measure, to protect passersby from the actions of overly aggressive protesters, and to protect the protesters themselves from the consequences of their dangerous behavior.

Section (6) of the injunction prohibits protesters from targeting the homes of Clinic workers with focused protests that are incompatible with the nature of a residential neighborhood. Petitioners argue that the injunction prohibits anyone from "discuss[ing] pro-life beliefs with another individual" within 300 feet of a targeted residence, and then assert that "[t]he injunction has instituted a six and one-half acre zone of silence punishable by the wrath of the court if the silence is broken." Petitioners' Brief 19. This does not accurately describe the terms of the injunction. The injunction prohibits "approaching, congregating, picketing, patrolling, demonstrating or using bullhorns or other sound amplification equipment within three-hundred (300) feet of the [Clinic worker's] residence," and also prohibits blocking, barricading, or attempting to block the exit, entrance, or driveway of the worker's residence. J.A. 59-60. Nothing in the injunction prohibits Petitioners from discussing their views with other persons not associated with the Clinic, nor does the injunction impose a "six and one-half acre zone of silence."

In *Frisby v. Schultz*, 487 U.S. 474 (1988), this Court upheld an ordinance directed at precisely the same type of behavior as Petitioners engaged in here. The ordinance banned all picketing "before or about the residence or dwelling of any individual in the Town of Brookfield, [Wisconsin]." *Id.* at 477. Both the injunction and the

[24] Petitioners' own witness described the dangers posed by picketing and leafletting on this highway. J.A. 464, 483. Captain Allgeyer of the Melbourne Police Department testified that it would be "deadly" to hand out literature on U.S. Highway 1. J.A. 313. He further testified about his concern stemming from an incident in which a child almost got hit by a car. J.A. 259.

Brookfield ordinance prohibit conduct intended to harass clinic workers in order to convince those workers to cease their work with the Clinic. *See Id.* 487. Both the ordinance and the injunction seek to provide some protection for a captive, unwilling audience in the sanctity of the home. "The resident is figuratively, and perhaps literally, trapped within the home, and because of the unique and subtle impact of such picketing is left with no ready means of avoiding the unwanted speech." *Id.*

If anything, this is a more compelling case than Frisby. In *Frisby*, the picketing had been sporadic and peaceful, and never involved any obstruction of the streets or disorderly conduct. There is no indication in *Frisby* that any threats were made to the doctor whose activities gave rise to the Brookfield ordinance. In this case, on the other hand, the picketing and demonstrations in front of the Clinic workers' homes were raucous, with protesters approaching the workers, "carrying signs, walking up and down on the sidewalk or street in front of the residence, shouting at passers-by, contacting (ringing the doorbells of) neighbors, and providing literature identifying the clinic employee as a 'baby killer.'" J.A. 53. The Clinic doctor was implicitly threatened by one of the protesters, at a time when a physician working at a Pensacola clinic had just been shot and killed by protesters. J.A. 54-55. Protesters distributed "Wanted" and "Warning" posters identifying the Clinic's doctor by name. J.A. 92. Other Clinic workers also received direct threats, J.A. 107, 555-56, and one Clinic worker was identified by name and told by a protester that "I pray God strikes you dead now." J.A. 556.[25]

[25] Portions of Sections (5), (7) and (8) prohibit threats, harassment and intimidation. To this extent, the injunction is justified by the rule that threats are entirely unprotected by the First Amendment. *See R.A.V. v. City of St. Paul*, 112 S. Ct. at 2546; *Watts v. United States*, 394 U.S. 705, 707 (1969) (upholding statute criminalizing threats against the President). Although threats usually take the form of pure speech, they are more akin to conduct rather than expression because they do not communicate ideas or attempt to convince listeners through intellectual persuasion.

To protect the workers and patients, Judge McGregor included several provisions prohibiting protesters from threatening or harassing individuals

In perhaps the most insensitive invasion of residential privacy, protesters went to the home of a nurse who was at the Clinic, approached her minor children when they were home alone, and screamed at the children to stop their mother from killing babies. J.A. 505-09. Nurse Doyle's terrified little girls were not willing participants in a debate about abortion rights. They were frightened children who had been subjected against their will to a group of strangers calling their mother a murderer. There is no serious question on these facts that, as in *Frisby*, *see* 487 U.S. at 477, the injunction was necessary to preserve public safety, prevent emotional distress to residents, and protect the tranquility and privacy

associated with the Clinic. *See* J.A. 60. Petitioners object to these provisions by formalistically parsing the terms of the injunction, *see e.g.*, Petitioners' Brief 12, 29, but seem oblivious to the overriding purpose of these provisions. For example, Judge McGregor included Section (5) in response to extensive evidence that protesters were aggressively surrounding cars coming to the Clinic, shouting insults and epithets to the occupants, attempting to throw literature inside moving cars, and generally attempting to intimidate patients and threaten workers and volunteers associated with the Clinic. J.A. 53-55.

The logical response to such behavior by Clinic workers and patients was not the reasoned "listeners' reaction to speech" that this Court referred to in the portion of *Forsythe County v. Nationalist Movement*, 112 S. Ct. 2395, 2403 (1992), on which Petitioners rely in their attack on this portion of the injunction. Rather, the reaction of Clinic workers and patients to this behavior was abject fear. This fear was manifested in the patients by increased blood pressure, greater tension and increased risk of medical complications. J.A. 54. It was manifested in workers by feelings of intimidation and anxiety, which led some workers and the doctor to quit working for the Clinic altogether. J.A. 55. These effects — which had nothing to do with the intellectual merits of Petitioners' arguments — were exactly what Petitioners and their fellow protestors sought. In other words, the threats and intimidation worked.

Against this background, it was unfortunately necessary for the judge to include in the injunction a provision instructing Petitioners and those acting in concert with them that individuals "shall have the absolute right to leave or walk away and the [Petitioners] shall not accompany such [individuals], encircle, surround, harass, threaten or physically or verbally abuse those individuals who choose not to communicate with them." J.A. 59.

residential neighborhood. *See Rowan v. Post Office Dept.*, 397 U.S. 728, 737 (1970) ("Nothing in the Constitution compels us to listen to or view any unwanted communications, whatever its merits . . . .The ancient concept that 'a man's home is his castle' into which 'not even the King may enter' has lost none of its vitality , and none of the recognized exceptions includes any right to communicate offensively with another.")

As this brief description of the evidence indicates, each provision of the injunction was addressed to a specific problem created by the conduct of Petitioners and those acting in concert with them. A common theme runs through every section of the injunction: The injunction is aimed not at the ideas expressed by the protesters, but at the harmful manner in which they expressed those ideas. Therefore, Petitioners' concerns about content-based discrimination are misplaced, and none of the injunction's provisions violate the First Amendment.

2. The Injunction Seeks to Regulate Only the Secondary Effects, Not the Content, of Petitioners' Speech.

The injunction also should be upheld because it is aimed at regulating the "secondary effects," rather than the content of speech. The secondary effects rationale permits the regulation of an identifiable category of speech if the regulation is justified "'without reference to the content of the regulated speech.'" *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41, 48 (1986) (citation omitted) (upholding zoning regulation that applied only to adult movie theaters). In this respect, the secondary effects rationale complements the speech/conduct distinction discussed in the previous section, since the main point of a secondary effects regulation is to address the non-communicative aspects of expression. Likewise, many of the secondary effects targeted by an injunction such as the one at issue in this case will result from the conduct of Petitioners, not their expression.

However, the secondary effects rationale goes beyond the speech/conduct distinction because it permits even the incidental

regulation of pure speech if the regulation is justified without regard to the content of that speech.

> We spoke in [*Renton*] only of secondary effects of speech, referring to regulations that apply to a particular category of speech because the regulatory targets happen to be associated with that type of speech. So long as the justifications for regulation have nothing to do with content, . . . we concluded that the regulation was properly analyzed as content neutral.

Boos v. Barry, 485 U.S. 312, 320 (1988) (plurality opinion) (emphasis omitted). *See also Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 298 n.8 (1984) ("Reasonable time, place, or manner restrictions are valid even though they directly limit oral or written expression.").

Although Petitioners cite *Boos* repeatedly to support their position in this case, *see* Petitioners' Brief 12, 14-16, 18, 19, 30, they fail to note the crucial difference between the regulation struck down in that case and the injunction at issue here. In *Boos*, the Court struck down a prohibition on placing signs within 500 feet of an embassy because the alleged "secondary effect" offered to justify the prohibition depended entirely on the listener's agreement or disagreement with the content of the signs. *Boos*, 485 U.S. at 321 (plurality opinion). However, Justice O'Connor specifically noted several content-neutral secondary effects that *would* justify a regulation on signs placed near embassies, including "congestion, . . . interference with ingress or egress, . . . visual clutter, [and] the need to protect the security of embassies." *Id.*

The effects to which Judge McGregor addressed the injunction in this case were precisely the sort of content-neutral secondary effects noted by Justice O'Connor in *Boos*. These effects included such things as the threat to patients' health caused by the surging crowds of demonstrators, the demonstrators' blockage of the Clinic entrance, the resignation of the Clinic's doctor and a nurse as a result of constant harassment by protesters, traffic congestion outside the Clinic, and the disruption of Clinic workers' home lives by

residential picketing and demonstrations. As demonstrated in the previous section, many of these effects occur because Petitioners and those acting in concert with them have engaged in unprotected conduct that may be regulated by the state. However, even if some of Petitioners' actions that cause these effects constitute expression, the harmful secondary effects of such expression justify the narrowly drawn provisions of this injunction.

B. THE INJUNCTION IS NARROWLY TAILORED TO SERVE A SIGNIFICANT GOVERNMENTAL INTEREST.

A time, place, and manner restriction of speech is permissible only if it is "narrowly tailored to serve a significant governmental interest." *Clark v. Community for Creative Non-violence*, 468 U.S. 288, 293 (1984). Although a time, place, and manner regulation must be narrowly tailored, "it need not be the least restrictive or least intrusive means of [serving the government's interest]. Rather, the requirement of narrow tailoring is satisfied 'so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.'" *Ward v. Rock Against Racism*, 491 U.S. 781, 798-99 (1989)(citation omitted).

The preceding sections have discussed the general nature of the governmental interests justifying the injunction at issue in this case. The Florida Supreme Court summarized these interests in its unanimous opinion upholding this injunction:

> A woman's freedom to seek lawful medical or counseling services in connection with her pregnancy constitutes a clear personal right under both our state and federal constitutions. *See Roe v. Wade*, 410 U.S. 113 (1973); *In re T.W.*, 551 So. 2d 1186, 1193 (Fla. 1989). Our state also has strong interests in . . . promoting the free flow of traffic on public streets and sidewalks, and in protecting property rights of all Florida citizens.
>
> . . .

> [In addition], 'the protection of residential privacy' constitutes 'a significant governmental interest' and . . . '[o]ne important aspect of residential privacy is protection of the unwilling listener.' [*quoting Frisby v. Schultz*, 487 U.S. 474, 484 (1988)].
>
> . . .
>
> We conclude that the reasoning underlying the governmental interest in residential privacy applies even more convincingly to the state interest in ensuring medical privacy. Florida citizens are entitled to both unimpeded access to licensed medical facilities and freedom from unwanted confrontations and communications when undergoing lawful medical treatment, particularly where the effect of such confrontations is to place the patient's health and safety in jeopardy.

Operation Rescue v. Women's Health Ctr., Inc., 626 So. 2d 664, 672 (Fla. 1993).

The restrictions imposed by this injunction on Petitioners speech are narrowly drawn to achieve these interests.[26] Indeed, there is

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[26] Judge McGregor's injunction is no broader than injunctions entered in similar cases by other courts throughout the country. For examples of injunctions creating buffer zones around clinics, see *Northeast Women's Ctr., Inc. v. McMonagle*, 939 F.2d 57, 64 (3d Cir. 1991) (peaceful picketing within 500 feet of center limited to six persons on a designated side); *Portland Feminist Women's Health Ctr. v. Advocates for Life, Inc.*, 859 F.2d 681, 684 (9th Cir. 1988) (prohibited demonstrations and leafletting in a zone extending out from the center of the front door to the curb and 12½ feet on either side of this line); *Pro-Choice Network v. Project Rescue Western N.W.*, 799 F. Supp. 1417, 1434 (W.D.N.Y. 1992) (with the exception of two sidewalk counselors, demonstrators prohibited from coming within 15 feet of the clinic's entrances and 15 feet from persons and vehicles approaching the clinic); *Horizon Health Ctr., v. Felicissimo*, 622 A.2d 891, 896 (N.J. Super. Ct. App. Div. 1993) (restriction limited demonstrators to the "sidewalk on the western side of [the street] opposite [the center]"), *cert. granted*, 634 A.2d 527 (1993); *Fargo Women's Health Org., Inc. v. Lambs of Christ*, 502 N.W.2d 536, 537 (N.D. 1992) ("peaceful picketing" limited during business hours to two persons within

substantial evidence that the judge had no option other than this injunction to remedy the significant governmental interests in protecting the Clinic's patients and workers. Before entering the injunction at issue here, the judge determined that Petitioners and those acting in concert with them had routinely violated a previous injunction containing broader and more general language. J.A. 50-51. The judge also heard testimony that police were reluctant to enforce an injunction without clear lines demarcating the area in which protests were allowed. J.A. 258. Finally, the judge was confronted with Petitioners who testified that they were willing to violate the law if necessary to do God's will. J.A. 623. Thus, the judge was forced to resort to an injunction containing specific provisions, which would give all parties clear guidance and protect the legitimate interests of everyone.

Section (3) of the injunction simply separates the Clinic workers

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100 feet of the clinic property); *Planned Parenthood Ass'n v. Holy Angels Catholic Church*, 765 F. Supp 617, 626 (N.D. Cal. 1991) (prohibited demonstrating, picketing, leafletting or counseling within 25 feet of any clinic entrance); *Bering v. SHARE*, 721 P.2d 918, 929 (Wash. 1986) (restrained picketers' activities "to Stevens Avenue, away from the [medical] building's entrance and the sidewalk fronting the building"), *cert. dismissed*, 479 U.S. 1050 (1987). For examples of injunctions limiting residential picketing, *see Northeast Women's Ctr.*, 939 F.2d at 67, 68 n.16 (3d Cir. 1991) (upheld 2500 feet prohibition on use of sound amplification equipment and remanded for possible modification 2500 feet prohibition on residential picketing because record did not support restriction greater than 500 feet); *Kaplan v. Prolife Action League*, 431 S.E.2d 828, 846 (N.C. Ct. App. 1993) (banned "picketing, parading, marching or demonstrating" within 300 feet of center line of physician's street); *Murray v. Lawson*, 624 A.2d 3, 8 (N.J. Super. Ct. App. Div.) (prohibited demonstrating within 300 feet of physician's residence), *cert. granted*, 627 A.2d 1149 (1993); *Boffard v. Barnes*, 624 A.2d 1, 2 (N.J. Super. Ct. App. Div.), *cert. granted*, 627 A.2d 1150 (1993); *Dayton Women's Health Ctr. v. Enix*, 589 N.E.2d 121, 124 (Ohio Ct. App. 1991) (prohibited picketing within the viewing distance of the homes of the workers and the patients of the clinic), *appeal dismissed*, 583 N.E.2d 971 (1992), *cert. denied sub nom. Sorrell v. Dayton Women's Health Ctr., Inc.*, 112 S. Ct. 3033 (1992).

and patients from the protesters, ensuring that Petitioners can have their say without interfering in the interests of others, and simultaneously guaranteeing that the public can pass down a public roadway without being confronted with an unruly crowd flowing into the street.

Section (4) of the injunction prohibits sights and sounds that would disturb patients undergoing surgery. Protesters can sing, chant, whistle, shout, yell, use bullhorns, etc., (subject to the application of Melbourne's public nuisance ordinances) at all times of day except the brief period during which patients are undergoing surgery or recovering from surgery. Petitioners cannot claim that this narrow provision violates their First Amendment rights without simultaneously casting into doubt every hospital quiet zone in the country.

As noted previously, Sections (5), (7), and (8) of the injunction protects Clinic patients and workers from precisely the kinds of individualized threats and harassment that Petitioners and those acting in concert with them had repeatedly inflicted upon the patients and workers in the past. Likewise, Section (6) of the injunction, like the ordinance in Frisby, is specifically crafted to eliminate the "'evil' of targeted residential picketing," *Frisby*, 487 U.S. at 487, of which the Court also had abundant evidence.

In light of the extensive testimony in this case, the trial court's injunction easily meets this Court's requirement that the "regulation promotes a substantial government interest that would be achieved less effectively absent the regulation."' *Ward v. Rock Against Racism*, 491 U.S. at 799. The Petitioners attempt to evade this conclusion by once again mischaracterizing the scope of the injunction. Petitioners' Brief 23. Petitioners apparently find two "fundamental flaw[s]" in the Florida Supreme Court's opinion. First, in contrast to the holding of the Florida Supreme Court, Petitioners argue that their picketing is "not solely directed at the Clinic, workers, and patients, but is directed to the public at large." *Id.* This contention is not supported by the record in this case, nor, even if it were true, does it undercut the narrow terms of the in-

junction. The evidence introduced at trial overwhelmingly indicates that Clinic workers and patients were intentionally targeted and repeatedly harassed by Petitioners and other protesters. Also, the injunction is crafted in a way that leaves Petitioners free to address their arguments to the public. The buffer zones established in Sections (3), (5), and (6) of the injunction protect Clinic workers and patients. These sections leave Petitioners free to address their arguments to other members of the public without restriction.

Petitioners' second "fundamental flaw" is based on their misreading of the injunction, which they argue contains a "flat ban on singing, chanting, images observable, and consent speech." *Id.* In contrast to Petitioners' interpretation, the explicit terms of Section (4) of the injunction permit singing, chanting, and images observable during the hours in which surgical procedures or recovery takes place, now two days a week on Wednesdays and Saturdays. None of these activities is "flatly banned." Likewise, the injunction does not ban "consent speech" or the "distribution of literature absent 'invited contact.'" *Id.* The injunction merely protects patients and workers from aggressive, threatening, and even dangerous behavior while those individuals are in close proximity to the Clinic or their homes.

C. THE INJUNCTION ALLOWS PETITIONERS AMPLE ALTERNATIVE AVENUES TO COMMUNICATE THEIR IDEAS.

In their brief, Petitioners make the unexceptionable claim that a complete ban of all speech opposing abortion would fail First Amendment scrutiny. Petitioners' Brief 19. This is true, but irrelevant to the present case. The injunction at issue here does not impose a complete ban on all speech objecting to abortion. Although the injunction does channel Petitioners' speech, it leaves open many different avenues for getting their points across effectively. As this Court stated in *Ward v. Rock Against Racism*, "[t]hat the city's limitations on volume may reduce to some degree the potential audience for respondent's speech is of no consequence, for there has been no showing that the remaining avenues of communication are inadequate." *Ward*, 491 U.S. at 802.

In this case, the thirty-six foot buffer zone around the Clinic leaves Petitioners substantial opportunities to communicate their views.[27] Petitioners' witness Unterberger acknowledged that there was a parking lot across the street from the Clinic where interested persons could "pull in" and take literature. J.A. 471. Literature was also available throughout Melbourne at "counseling clinics" operated by anti-abortion groups. J.A. 471. The street on which the Clinic is located is a horseshoe, so all cars approaching the Clinic reach it by turning off U.S. Highway 1. J.A. 304. Therefore, protesters standing next to the Clinic, where the Clinic abuts U.S. Highway 1, can communicate with people in cars approaching the Clinic. J.A. 305. Protesters standing across the narrow, residential street from the Clinic could also be heard and seen clearly from the Clinic parking lots. J.A. 260, 305. In fact, Petitioners' witness Unterberger acknowledged that the restriction incorporated in the injunction was narrow enough to place the protesters at a distance no greater than ten to twelve feet from cars approaching and leaving the Clinic. J.A. 486. In fact, the protesters can be within a few inches of cars going east on Dixie Way. *See* J.A. 65.

The residential buffer zone likewise offers Petitioners ample alternative means of communicating their views. As in *Frisby*, "[p]rotesters have not been barred from the residential neighborhoods. They may enter such neighborhoods, alone or in groups, even marching. . . . They may go door-to-door to proselytize their views. They may distribute literature in this manner . . . or through the mails. They may contact residents by telephone, short of harassment." *Frisby*, 487 U.S. at 484. Also as in *Frisby*, the residential buffer zone in this case is limited, restricting only targeted picketing focused on a particular house. Therefore, "the limited nature of the prohibition makes it virtually self-evident that ample alternatives remain." *Id.* at 483.

The other provisions of the injunction also leave obvious alternative avenues available to Petitioners. The prohibition on obtrusive sights and sounds applies only during hours when surgery and recov-

[27] The zone for the east side of the property is only five feet and the property to the west and north of the Clinic is residential.

ering from surgery are taking place. J.A. 59. The prohibition on harassment of persons seeking the services of the Clinic within 300 feet of the Clinic does not prevent Petitioners from discussing their views with willing listeners, and permits Petitioners to communicate their views in any manner they want when not within proximity of the Clinic. Nothing prohibits the protesters from addressing these individuals outside the narrow buffer zones, debating them publicly in a neutral forum, or addressing them indirectly through advertisements, editorials, and their continued daily presence directly across the street from the Clinic. The First Amendment guarantees the right to speak; it does not guarantee a captive and receptive audience.

In short, even if Petitioners comply to the letter with every provision of this injunction, they are still fully capable of expressing their views effectively to the world at large, and even to the Clinic workers and patients passing no more than ten to twelve feet from where the protesters are standing. Without question, the injunction limits the methods Petitioners may use to communicate their views. The injunction denies Petitioners the ability to continue aggressively confronting Clinic patients, shouting epithets at Clinic patients while those patients are undergoing surgery, surrounding the cars of persons coming to the Clinic, and harassing the children of Clinic workers at the workers' homes. But as this Court has pointed out, "[T]he First Amendment does not guarantee the right to communicate one's views at all times and places or in any manner that may be desired." *Heffron v. International Society for Krishna Consciousness*, 452 U.S. 640, 647 (1981).[28]

[28] In addition to their free speech claims, Petitioners also contend that the injunction violates their right of free association under the First Amendment. The extent of Petitioners' right of free association depends on the extent of their right to free speech. This Court has recognized a right of free association "for the purpose of engaging in those activities protected by the First Amendment — speech, assembly, petition for the redress of grievances, and the exercise of religion. The Constitution guarantees freedom of association of this kind as an indispensable means of preserving other individual liberties." *Roberts v. United States Jaycees*, 468 U.S. 609, 618 (1984). In this case, the underlying right claimed by Petitioners is the right of free speech. Thus, if restrictions — such as reasonable time, place and manner regulations — may be imposed on the underlying right of free speech, the right of free association is necessarily limited to the same extent. The injunction in this case does not deny anyone their rights "merely because an individual belonged to a group," *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 920 (1982), nor does it make "peaceable assembly for lawful discussion" a crime. *De Jonge v. Oregon*, 299 U.S. 353, 365 (1937). As shown in this section, the injunction simply limits the extent to which Petitioners and those acting in concert with them may impede access to medical care, obstruct traffic, harass Clinic personnel, and engage in other unprotected activities. If Petitioners have no constitutional right to do these things individually, they certainly have no constitutional right to do these things in a large group.

II.
THE INJUNCTION IS NOT OVERBROAD.

Petitioners' claim that the injunction is overbroad misconceives the very concept of overbreadth. In challenging the injunction's restriction of their own proposed activities, Petitioners fall outside the purpose and scope of the overbreadth doctrine. Moreover, even if Petitioners' claim can be entertained, their allegations of theoretical and marginal overreaching fail to meet this Court's requirement of real and substantial overbreadth.

A. PETITIONERS' CLAIM THAT THE INJUNCTION BARS BEHAVIOR IN WHICH THEY SEEK TO ENGAGE FAILS TO STATE A CLAIM FOR OVERBREADTH.

Petitioners' attack on various facets of the injunction's reach constitutes an "as applied" challenge, not a claim of overbreadth. The overbreadth doctrine voids a law in its entirety if the law "does not aim specifically at evils within the allowable area of [governmental] control, but . . . sweeps within its ambit other activities that . . . constitute an exercise" of First Amendment rights. *Thornhill v. Alabama*, 310 U.S. 88, 97 (1940). Permitting parties whose own conduct may not be protected to mount a facial challenge serves "the interest in preventing an invalid statute from inhibiting the speech of third parties who are not before the Court." *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 800 (1984).

In this instance, however, allowing Petitioners to invoke the rights of others would not advance that interest. It is Petitioners and those acting in concert with them, not hypothetical third parties, who wish to penetrate the three-hundred foot buffer zone, Petitioners' Brief 29, harass doctors and employees at the Clinic, *id.*, and otherwise engage in activities prohibited by sections (3) through (9) of the injunction. Id. at 27-30. *See Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 504 (1985) (action for invalidation of entire statute inappropriate where "the parties challenging the statute are those who desire to engage in protected speech that the overbroad statute purports to punish"). Only to the extent that the injunction forbids those who may later act "in concert or participation with" Petitioners does the order restrict persons who cannot currently be identified. However, since such individuals would be challenging one or more of the same restrictions that Petitioners assert are unconstitutional, their claims would be identical to those now made by Petitioners. Thus, only an as applied challenge is appropriate here. *See Taxpayers for Vincent*, 466 U.S. at 801 (refusing to entertain facial challenge based on overbreadth where there is "nothing in the record to indicate that the ordinance will have any different impact on third parties' interests in free speech" than it has on parties before the Court).

B. THE INJUNCTION AS A WHOLE DOES NOT VIOLATE THE PROHIBITION OF "REAL AND SUBSTANTIAL" OVERBREADTH.

A law will not be struck down as overbroad simply because a small number of its theoretical invalid applications can be imagined. Rather, legislative overreaching has proved fatal to the entire statutory scheme only where the overbreadth has been "not only . . . real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973). As already discussed, Judge McGregor's injunction is narrowly tailored to curb the abuses that prompted his order, see supra at I-B, and therefore necessarily is not overbroad. However, even if the injunction is found to be imperfectly tailored to combat these

abuses, the slight extent to which the order may exceed its permissible scope does not approach the high level of "real and substantial" overbreadth required for invalidation.

Petitioners themselves tacitly acknowledge that the core of the injunction does not bar protected activity. They concede that the court may prohibit them from entering the premises and property of the Clinic. Petitioners' Brief 27. They agree that the order properly bars them from "blocking, impeding, inhibiting, or in any other manner obstructing or interfering with access to, ingress into and egress from any building or parking lot of the Clinic." *Id.* Nor do they challenge the order's authorization of efforts to identify those persons engaged in a phone blockade and jamming of the Clinic's phone lines. Indeed, Petitioners do not even contend that the injunction's remaining restrictions cover only protected activity. Rather, they argue that some portions of these restrictions prohibit behavior in which they have the right to engage. *See id.* at 27-30.

Thus, even if Petitioners have correctly identified potential impermissible applications of the order, this marginal infringement on protected activity does not rise to the "embracing sweep . . . over protected expression," *New York v. Ferber*, 458 U.S. 747, 771 (1982), that triggers total invalidation under overbreadth. Specifically, it may be possible (though Respondents deny) that a buffer zone of somewhat smaller dimensions than the three hundred foot area imposed by sections (5) and (6) would serve the purpose of the order equally well. Similarly, while the prohibition in section (4) of "singing, chanting, whistling, shouting, yelling, use of bullhorns, auto horns, sound amplification equipment or other sounds or images observable to or within earshot of the patients inside the Clinic" during surgery and recovery periods clearly promotes the well-being of patients, it is conceivable (though not realistically within the operative reach of the order) that some type of sign could be displayed to patients on the Clinic property or noise emitted that patients could detect without harm to their treatment. There may even be forms of "intimidating," "crowding," "harassing," and "encouraging" of violation of the order, see Petitioners' Brief 29 (arguing that these terms are overbroad), that are shielded by the

First Amendment. In each of these provisions, however, the legitimate applications of the prohibition greatly exceed the instances in which the provision arguably bars protected expression. The valid reach of these and other disputed provisions, together with those parts of the injunction which Petitioners have not questioned, far eclipse the relative handful of ways in which the order colorably gives rise to First Amendment challenges. Where a regulation thus " 'covers a whole range of easily identifiable and constitutionally proscribable conduct,'" *Osborne v. Ohio*, 495 U.S. 103, 112 (1990) (quoting *New York v. Ferber*, 458 U.S. 747, 770 n.25 (1982)), and conversely affects protected expression only "at its margins," *Osborne*, 495 U.S. at 112, the Court has declined to administer the "strong medicine"[29] of facial invalidation.[30]

Numerous decisions illustrate this Court's refusal to impose the severe sanction of facial invalidation at the behest of those who, like Petitioners, nip at the edges of a basically valid regulation. In *Grayned v. Rockford*, 408 U.S. 104 (1972), for example, the Court rejected an overbreadth challenge to an antinoise ordinance forbidding a person while on grounds adjacent to a building in which a school is in session to "make or assist in the making of any noise or diversion which disturbs or tends to disturb the peace or good order" of that school." *Id.* at 108. The City of Rockford ordinance could have been literally construed to outlaw comments on religion, social issues, and public affairs audible to and "disturbing" a single student or teacher at any school, just as Petitioners argue that section (4) of Judge McGregor's injunction "could literally prevent bumper stickers on parked cars, the wearing of lapel pins, or the display of a picket sign" observable by someone within the Clinic

[29] *Broadrick*, 413 U.S. at 613.

[30] By contrast, the ordinance struck down as overbroad in *Houston v. Hill*, 482 U.S. 451 (1987), on its face clearly "criminalize[d] a substantial amount of constitutionally protected speech." *Id.* at 466. The statute made it "unlawful for any person to assault, strike or in any manner oppose, molest, abuse or interrupt any policeman in the execution of his duty, or any person summoned to aid in making an arrest." *Id.*, at 455.

during the hours of surgery. Petitioners' Brief 29.[31] The *Grayned* Court, however, did not base its holding on such hypothetical and marginal applications of the ordinance. Instead, the Court upheld the ordinance in light of the city's "compelling interest in having an undisrupted school session conducive to the students' learning." *Grayned*, 408 U.S. at 119. Similarly, here, the injunction is designed to promote the compelling interest of safeguarding the physical and mental health of those seeking the services of the Clinic, and like *Grayned's* ordinance "does not unnecessarily interfere with First Amendment rights." *Id.*

Broadrick v. Oklahoma, 413 U.S. 601 (1973), similarly rejects the reliance on extreme and literal applications that characterizes Petitioners' argument.[32] *See, e.g.*, Petitioners' Brief 28 (arguing that section (3) of the injunction requires property owners near the Clinic to "screen all guests to insure no pro-life persons are invited who might wear an article of clothing advocating pro-life issues"). Broadrick involved an overbreadth challenge to a state statute limiting the political activities of its classified civil servants. The statute provided that employees could not "directly or indirectly, solicit, receive, or in any manner be concerned in soliciting or receiving any assessment . . . or contribution for any political organization, candidacy or other political purpose," and were prohibited from "tak[ing] part in the management or affairs of any political campaign, except . . . privately to express his opinion and to cast his vote." *Broadrick*, 413 U.S. at 605-06. It does not require a fertile imagination to conceive of many ways in which a zealous and literal-minded official might have enforced the statute to penalize protected activity. Rather than letting this possibility govern the outcome, however, the Court canvassed the many valid applications of the statute, *id.* at 616-17, and concluded that the statute must not "be

[31] The Petitioners do not explain how some of these objects are to be hoisted over the hedges and privacy fences, for this is the only area which can be seen from within the Clinic.

[32] Petitioners' discussion of the injunction ignores the actual terms of the injunction, which reach only the images observable within the Clinic during surgical hours. Moreover, Petitioners' far-fetched examples do not account for the hedges and the privacy fences which are around the Clinic.

discarded in toto because some persons' arguably protected conduct may or may not be caught or chilled by the statute." *Id.* at 618. Likewise, Judge McGregor's injunction need not be struck down in its entirety when "whatever overbreadth may exist" can "be cured through case-by-case analysis of the fact situations to which its sanctions, assertedly, may not be applied." *Id.* at 615.[33]

The actual conditions that prompted Judge McGregor's order make it especially inappropriate to rest invalidation on the order's theoretical application to innocuous activity. The record repeatedly discloses the discrepancy between the abuses that Judge McGregor sought to curb and fears professed by Petitioners and amici that the order will penalize benign and protected behavior. For example, to the extent that the injunction reduces the opportunities for "sidewalk counseling," see Brief for The Southern Center for Law & Ethics, et al. at 6-8, it is not a "nonthreatening," "friendly, helpful, and nonoffensive" approach, *id.* at 5-6, at which the order is aimed and which is said to characterize this activity. Rather, the order was provoked by and seeks to prevent the recurrence of conduct, including stalking, that has endangered the health of the Clinic's patients and struck fear in the hearts of patients, doctors, and other employees: e.g., yelling and screaming at those entering the Clinic, J.A. 203; chasing a doctor and pointing a finger toward him in the form of a gun, J.A. 190-191; converging on cars approaching the Clinic and shouting out the names of passengers whose identities have been traced through their prior presence at the Clinic, J.A. 538-42. Similarly, nothing in the history

[33] *New York v. Ferber*, 458 U.S. 747 (1982), offers yet another illustration of the principle that parties subject to a law's legitimate reach may not evade the law by identifying a small number of possible invalid applications. *Ferber* upheld a criminal statute prohibiting knowing promotion of sexual performances by children under sixteen. *Id.* at 749. While acknowledging that the statute's ban could fall on some arguably protected activity "ranging from medical textbooks to pictorials in the National Geographic," *id.* at 773, the Court rejected an overbreadth challenge largely because the statute's "legitimate reach dwarfs its arguably impermissible applications." *Id.*

of this dispute or the content of the order indicates any intent to turn "[v[irtually the entire City of Melbourne . . . into a no speech zone." Petitioners' Brief 29. Instead, the order seeks to vindicate the state's compelling interest in preventing Petitioners and others from disrupting the operation of a medical facility. While the injunction admittedly covers a substantial range of activity, the order's scope must be viewed against repeated disregard for earlier orders, J.A. 393, Petitioner Martin's avowed intent to block abortions in Brevard and Seminole County, J.A. 6-8, and Petitioners' leadership of a group that expresses its intent to ignore state law that interferes with its "rescue" mission, J.A. 623.

The gap between Petitioners' version of the order's reach and the actual operation of the injunction is particularly evidenced by their extended criticism of the order's application to those who act "in concert" with Petitioners. *See* Petitioners' Brief 26-28. Petitioners' support for this contention is as dubious as their standing to raise it.[34] As proof of the alleged overbreadth of this provision, Petitioners cite the arrest of Mr. Quintero, who testified that "he had no idea who the parties were in the Injunction, that he did not belong to any group but was 'just a normal Christian that went to pray on the sidewalk.'" *Id.* at 26. If indeed Mr. Quintero had no notice of the injunction, then this provision could not be enforced against him. Petition for Writ of Certiorari at A-22 (authoritative construction of Florida Supreme Court). Conversely, the trial judge would be acting within permissible discretion in refusing to credit the representations underlying Mr. Quintero's statement: that he chose this isolated strip as a place to pray without any prior consultation with "any group" also praying there (for, *inter alia*, the death of doctors employed by the Clinic, J.A. 555-56); that while aware of the injunction he "had no idea who the parties were"; and that once upon the scene he was either oblivious to the aims of those seeking to obstruct the operation of the Clinic or had no desire to assist them in their enterprise. In any event, Mr. Quintero's testimony was offered in a preliminary hearing at which Judge McGregor made no final determinations, J.A. 69-70, and

[34] *See* Brief of the AFL-CIO at 9-10 (validity of "in concert" provision not properly before Court).

therefore cannot be relied upon to demonstrate the allegedly impermissible reach of the injunction.

Petitioners also appear to endorse a categorical rule that injunctions binding upon those "acting in concert or participation with" named parties are inherently unconstitutional when "applied to non-objective speech such as is found in Sections (3) through (9)." Petitioners' Brief 27 n.19. Petitioners cite no authority for this novel proposition. On the contrary, the "in concert" provision is "so standard that it is expressly sanctioned by the Federal Rules of Civil Procedure," Brief of AFL-CIO at 6 (citing Fed. R. Civ. P. 65(d)), without the sort of qualification that Petitioners have invented.[35]

The necessity of such a provision is especially obvious in the circumstances of this case. Petitioners apparently have an abundant if not endless supply of "John Does" to assist them in their effort to obstruct the operation of the Clinic. *See* J.A. 66-77. Thus, a requirement that the injunction be confined to parties identified in advance would severely hinder or even defeat the trial judge's ability to protect the operation of the Clinic and the safety of the patients, doctors, and employees who seek to enter it.

The Florida Supreme Court's clarification of "in concert or participation with" further demonstrates why the injunction should not be struck down for overbreadth. This Court regularly upholds potentially overbroad statutes and ordinances that have received a narrowing construction by state courts. *E.g., Osborne v. Ohio*, 495 U.S. 103, 120 (1990); *see also Frisby v. Schultz*, 487 U.S. 474, 483 (1988) (Court's interpreting ban on residential picketing to apply only to picketing directed at a single residence). It is only when state courts have neither supplied a narrowing construction nor are likely to that the Court has proceeded to the drastic remedy of facial invalidation. *See Houston v. Hill*, 482 U.S. 451, 469-71 (1987); *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 216 (1975). Here, in light of the obvious purpose of the injunction, and in the absence of enforcement in the extreme ways allegedly licensed by the order,

[35] *Cf. Calder v. Jones*, 465 U.S. 783, 790 (1984) (constitutional validity of jurisdiction not affected by parties' assertion of First Amendment rights).

there is no reason not to allow any remaining potential overbreadth to be averted by continuing reasonable construction.[36]

III.
THE INJUNCTION IS NOT VAGUE.

Petitioners correctly recite the principle that an injunction is unconstitutionally vague if it " 'either forbids or requires the doing of an act in terms so vague that [persons] of common intelligence must necessarily guess at its meaning and differ as to its application.' " Petitioners' Brief 30-31 (*quoting Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926)). However, Petitioners' challenge to the injunction ignores the explanation of this principle that the Court has articulated in the decades since *Connally*. Given the inherent imprecision of the language, *see Grayned v. Rockford*, 408 U.S. 104, 110 (1972), a law is not void for vagueness simply because "the fertile legal 'imagination can conjure up hypothetical cases in which the meaning of (disputed) terms will be in nice question.'" *Id.* at 110 n.15 (citation omitted). Rather, the determination of whether a regulation should be struck down for vagueness is made in light of the purposes underlying the proscription of

[36] Even should this Court find that the injunction "reaches a substantial number of impermissible applications," *Ferber*, 458 U.S. at 771, the order should not be struck down entirely. As "sparingly" as overbreadth doctrine is invoked to void statutes, *Broadrick*, 413 U.S. at 613, it should be resorted to even less to remedy defective injunctions. Applied to statutes, the possibility of facial invalidation deters legislators from casually drafting overbroad statutes in reliance on the availability of judicial correction of their errors. *See Osborne*, 495 U.S. at 121. These considerations, arising out of the relationship between the judicial and legislative branches, do not apply to appellate review of injunctive relief. Appellate modification of injunctions neither encourages infringement of constitutional rights nor encroaches on the prerogatives of another branch. *See, e.g. NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 924 n.67 (1982) (requiring permanent injunction to be either dissolved by the Mississippi Supreme Court or modified to restrain only unlawful conduct and the persons responsible for conduct of that character); *State Farm Fire & Casualty Co. v. Tashire*,386 U.S. 523, 537 (1967) (directing substantial modification of injunction).

laws that provide inadequate guidance. Petitioners, however, rest their contention that the injunction is vague on a series of theoretical uncertainties and improbable hypotheticals far removed from the reasons for the vagueness doctrine's existence.

A. THE INJUNCTION GIVES PETITIONERS FAIR WARNING OF WHAT ACTIVITY IS PROHIBITED.

Vague laws offend in large part because they "may trap the innocent by not providing fair warning." *Grayned*, 408 U.S. at 108. Here, Petitioners and their partners cannot plausibly maintain that they are unable to ascertain the restraints that the injunction places on their activity. Indeed, it is essentially the type of activity in which Petitioners have already engaged and which has disrupted the operation of the Clinic and endangered both those who work there and those who seek its services.

In light of the injunction's "announced purpose," *id.* at 112 and "particular context," *id.* (citation omitted), enforcement of the order does not threaten to ambush those subject to it in the fanciful ways that Petitioners describe. For example, Petitioners suggest that under the requirement in section (3) that crossing Dixie Way via the crosswalk be "prompt," those whose progress is hindered by disability, age, or inclement weather may inadvertently fall prey to this provision. *See* Petitioners' Brief 33. Similarly, while the limitation on "sidewalk counseling" within the 300 foot zone under section (5) simply forbids Petitioners and their partners to "accompany . . . encircle, surround, harass, threaten or physically or verbally abuse" those who decline such "counseling," Petitioners raise the specter that this provision may be invoked against any "pro-life person . . . discuss[ing] marital problems" in that area. *Id.* at 35. Still further in this imaginative vein, Petitioners paint the scenario of a person sharing their views who moves into the neighborhood of someone who could be classified as an "agent" of the Clinic under the most expansive legal definition of that term; Petitioners apparently fear that such a person could find that (s)he has violated the terms of section (6). *See id.* at 32, 35.

To void the injunction on the basis of these almost facetious constructions would clash with the realistic and contextual approach set forth in *Grayned*. The test is not whether the order's provisions, read in a vacuum for all of their literal worth, are susceptible to varying interpretation. Rather, the injunction is valid if its background and purpose afford a "particular context" from which its words can be reasonably understood by those subject to its restrictions. Thus, under this standard, Petitioners' effort to analogize the injunction to laws like the ordinance struck down in *Coates v. City of Cincinnati*, 402 U.S. 611 (1971), must fail. *See* Petitioners' Brief 34. The Coates ordinance made it a criminal offense for "three or more persons to assemble . . . on any of the sidewalks . . . and there conduct themselves in a manner annoying to persons passing by . . . ." *Coates*, 402 U.S. at 611. The intolerable inability to determine whether one's gathering fell under a city-wide ban on "annoying" assemblages bears no resemblance to the injunction's detailed notification to Petitioners and those acting in concert with them that they must cease their obstructive and dangerous behavior. A geographically confined injunction, which restricts activities such as blocking access to the Clinic, converging on cars and shouting epithets at their occupants, and threatening patients and employees of the Clinic, and which is specifically directed at those who have engaged in this behavior before and those who act in concert with them, more than adequately alerts those bound by the order of what conduct they must avoid.

B. THE INJUNCTION DOES NOT CHILL THE EXERCISE OF PROTECTED EXPRESSION.

A related but distinct defect of vague laws is that their "[u]ncertain meanings inevitably lead citizens to 'steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked.' " *Grayned*, 408 U.S. at 109 (citations omitted). Again, only by stretching the terms of the injunction far beyond their obvious import can Petitioners allege that they and others are deterred from engaging in protected activity by the possibility that such activity may be barred by the order. A reasonable person

will not feel compelled to refrain from discussing adoption in the vicinity of the Clinic. *See* Petitioners' Brief 35. Nor can Petitioners and those acting in concert with them realistically fear "approaching" with their message someone whose wish to use the Clinic and unwillingness to communicate with them cannot yet be determined. *See id.* at 34. Conversely, one need not "guess" on which side of the line between threatening and nonthreatening communications pointing the figure of a gun lies. *See id.*[37]

C. THE INJUNCTION DOES NOT ENCOURAGE ARBITRARY AND DISCRIMINATORY ENFORCEMENT.

The final principal vice of vague laws that this Court has identified is that they present "dangers of arbitrary and discriminatory applications." *Grayned*, 408 U.S. at 109. For the same reasons that the injunction's terms and context provide adequate notice to Petitioners and those acting in concert with them, the injunction also gives sufficient guidance to those who enforce it. The touchstone is not whether the injunction allows for some discretion, *see id.* at 114 (enforcement always "requires the exercise of some degree of police judgment"), but whether that discretion has been adequately confined. There is no realistic basis in the language, structure, or history of this injunction to believe that it will be used to accomplish anything other than the purpose for which it was issued: to prevent Petitioners and those acting in concert with them from further obstructing the operation of the Clinic and endangering its patients and employees. Nothing in the injunction's terms reasonably read or in the record of this case suggests that disabled protesters will be prosecuted for involuntary slow movement along the

[37] Moreover, even if some aspects of the injunction are held to be insufficiently precise, these defects can be cured by narrowing state construction, *see Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 60 (1976) (plurality opinion), or modification, *see supra* n.36, rather than invalidation of the entire order.

crosswalk, or that any other phantom abuse of authority that Petitioners have conjured up will actually materialize.[38]

CONCLUSION

The decision of the Florida Supreme Court should be affirmed.

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[38] The conclusion that the injunction is not vague is bolstered by the rejection, by at least three United States Courts of Appeal, of vagueness challenges to similar injunctions issued under similar circumstances. *See Northeast Women's Center, Inc. v. McMonagle*, 939 F.2d 57 (3rd Cir. 1991); *Medlin v. Palmer*, 874 F.2d 1085 (5th Cir. 1989); *Portland Feminist Women's Health Center v. Advocates for Life, Inc.*, 859 F.2d 681 (9th Cir. 1988).

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No. 93-880

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

JUDY MADSEN, ED MARTIN, and SHIRLEY HOBBS,
Petitioners,

v.

WOMEN'S HEALTH CENTER, INC.,
AWARE WOMAN CENTER FOR CHOICE, INC.,
EPOC CLINIC, INC., and CENTRAL FLORIDA
WOMEN'S HEALTH ORGANIZATION, INC.,
Respondents.

On Writ of Certiorari to the Supreme Court of Florida

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ARGUMENT

Respondents and their *amici* defend the Injunction by ignoring its actual terms. They argue that the historical context justifies any of its infirmities. Respondents then create a straw man argument by resorting to facts not in evidence,[1] distorting facts, and lumping

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[1] No evidence supports Respondents' assertions that Petitioners harassed staff at their homes, that public transportation does not visit the Clinic, that patients were stalked by Petitioners, that the Injunction was issued after repeated violations by Petitioners, that a leafletter can come within a few inches of a car outside of the thirty-six foot zone, that surgery now occurs only on Wednesday and Saturday, or that the court in *Cheffer v. McGregor*, 6 F.3d 705 (11th Cir. 1993), lacked evidence that the judge intended the Injunction to be enforced through civil contempt process. Respondents' Brief (hereinafter referred to as R.B.) 7, 10, 14, 19, 34, 35. Contrary to *amici*, Center for Reproductive Law & Policy, et al., there is no evidence that Petitioners threatened and shouted in the faces of patients and staff, called patients' family members, employees, and acquaintances, or the IMPACT team trained to harass, intimidate, stalk staff and patients, and blockade. *Id.* at 5, 12, 28. Contrary to *amici*, People for the American Way, et al., it is inaccurate to state that the Florida Supreme Court reviewed only the Injunction order, that no contempt convictions occurred as a result of the 1993 Injunction, or that Petitioners threatened, harassed, intimidated, and obstructed the Clinic. *Id.* at 10, 11, 13. Contrary to *amici*, United States, there is no evidence the Clinic erected a fence and a wall to exclude noise. *Id.* at 22 n.11. Contrary to *amici*, National Organization for Women, et al., there is no evidence Dr. Gunn was murdered by an affiliate of Rescue America, that Petitioners engaged in trespass, stalking, threats of physical harm, phone jamming, along with criminal and civil violations, that Michael Griffin was a member of Rescue America, that the 1992 injunction was repeatedly violated by Petitioners, or that Petitioners engaged in violent acts. *Id.* at 1, 5, 6, 25-27. Contrary to *amici*, American College of Obstetricians and Gynecologists, et al., there is no evidence that a sign can be seen only if displayed over a fence. *Id.* at 19, 30. Contrary to *amici*, State of Florida, et al., there is no evidence Operation Rescue America is a successor to Operation Rescue, that the IMPACT team was organized by Madsen and Martin, that the Injunction prohibits only signs from ladders, or that noise was created by Rescue America. *Id.* at 3, n.2, 4, 5, 23, 27.

Petitioners with a parade of horribles.[2] Viewed in the absence of hysteria, the Injunction must be dissolved.[3]

I.

THE INJUNCTION IS NOT PRECISELY TAILORED TO ACCOMPLISH THE PIN-POINTED OBJECTIVE PERMITTED BY CONSTITUTIONAL MANDATE AND THE ESSENTIAL NEEDS OF THE CASE.

Respondents carelessly gloss over the extremely important threshold question of the constitutional standard governing speech-restrictive injunctions. This Court has cautioned that an injunction

> issued in the area of First Amendment rights must be couched in the narrowest terms that will accomplish the pin-pointed objective permitted by constitutional mandate and the essential needs of the public order. In this sensitive field, the State may not employ "means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." . . . In other words, the order must be tailored as precisely as possible to the exact

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[2] Respondents point to the accosting of Doyle's children at her home. Such conduct is clearly reprehensible but it had nothing to do with Petitioners. If the judge tried to aim the Injunction at that type of conduct, he missed and instead struck Petitioners.

[3] Before the Florida Supreme Court, Petitioners requested review on its face and as applied, and at oral argument requested *de novo* review. Stating that its "own review of the record" showed the Injunction was supported by "competent, substantial evidence," the Florida Supreme Court purported to review the evidence. Pet. App. A-12. This Court has authority to undertake its own *de novo* review. *See, e.g., Peel v. Attorney Registration & Disciplinary Commission of Illinois*, 110 S.Ct. 2281, 2291-92 (1990); *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485 (1984); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 916 n.50 (1982).

> needs of the case.

Carroll v. President and Commissioners of Princess Anne, 393 U.S. 175, 183-84 (1968) (quoting *Shelton v. Tucker*, 364 U.S. 479, 488 (1960)).

Respondents argue the Injunction is content neutral. However, they concede not all images are prohibited but only those tending to "traumatize," the gag rule of Section (5) should be changed to a hecklers' veto, and the word "encouraging" should be stricken from Section (9). R.B. 24, 34, 42 n.33, 43; J.A. 79-80. These concessions prove the Injunction is content-based. A listener's "reaction to speech is not a content-neutral basis for regulation." *Forsyth County v. Nationalist Movement*, 112 S.Ct. 2395, 2404 (1992); *see also Boos v. Barry*, 485 U.S. 312, 321 (1988) (emotive impact of speech is not unrelated to content).[4] Moreover, Respondents' admission that the Injunction *permanently* removes pro-life speech to the other side of Dixie Way, while allowing pro-choice speech on the sidewalk, underscores the fact that it is content-based. R.B. 23. *See* Petitioners' Brief 8-20.

Free speech necessitates a heavy presumption against, and a demanding review of, anti-speech injunctions. *See amici* briefs of AFL-CIO 6-24; and Operation Rescue, et al. Injunctions against

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[4] Respondents criticize the finding in *Cheffer*, 6 F.3d at 705, that the Injunction was viewpoint based. R.B. 18, 21. On the one hand, Respondents argue that the Injunction is content neutral because it does not mention abortion in Sections (1) through (9), but by admitting the intent of the Injunction was to prohibit images that "traumatize." Respondents' admission supports the reasoning of *Cheffer*. A political or birthday sign would not be prohibited under Respondents' rationale, but a sign with the words "Baby Killer" could "traumatize" someone associated with the Clinic and would therefore be banned. The trial court acknowledged that the Injunction applies to any activities that seem "to be supportive of pro-life." J.A. 72.

expressive activity require heightened scrutiny.[5] Because injunctions restrict *future* expression, they are subject to the prior restraint doctrine which places a heavy presumption against their validity. Prior restraints on speech "are the most serious and the least tolerable infringement," because, unlike criminal or civil sanctions chilling speech, a prior restraint "freezes" speech. *Nebraska Press Association v. Stuart*, 427 U.S. 539 (1976).[6] This Court's precedents suggest that injunctive relief involving speech mixed with conduct must (1) not issue unless a legal wrong has been proven and existing law is inadequate;[7] (2) be limited to restraining illegal activities of those responsible for the illegal conduct;[8] and (3) serve an essential governmental purpose unrelated to expression

[5] *See, e.g., Alexander v. United States*, 113 S.Ct. 2766 (1993); *Vance v. Universal Amusement Co.*, 445 U.S. 308 (1980); *National Socialist Party of America v. Village of Skokie*, 432 U.S. 43 (1977); *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963); *Near v. Minnesota*, 283 U.S. 697 (1931); *see also* Blasi, *Toward a Theory of Prior Restraint: A Central Linkage*, 66 Minn. L. Rev. 11 (1981).

[6] The collateral bar rule prevents the speaker from ignoring the injunction and later challenging it in court. *Cf., Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969); *Walker v. City of Birmingham*, 388 U.S. 307 (1967).

[7] *See, e.g., United States v. Dixon*, 113 S.Ct. 2849, 2855 (1993); *Morales v. Trans World Airlines, Inc.*, 112 S.Ct. 2031, 2035 (1992); *Amoco Production Co. v. Village of Gambell*, 480 U.S. 531 (1987); *City of Los Angeles v. Lyons*, 461 U.S. 95, 111 (1983); *Sampson v. Murray*, 415 U.S. 61 (1973); Fed. R. Civ. P. 65.

[8] *See, e.g., Claiborne Hardware Co.*, 458 U.S. at 924 n.67; *Rizzo v. Goode*, 423 U.S. 362 (1976); *United Mine Workers of America v. Gibbs*, 383 U.S. 715, 731-32 (1966); *Chase National Bank v. City of Norwalk*, 291 U.S. 431 (1934).

and be precisely tailored to the exact needs of the case.[9] Judged accordingly, the Injunction must fail.

A. The 1993 Injunction Is Not Essential To Preserve Public Order Or Privacy Because Petitioners Never Violated The 1992 Injunction.

Though the trial court acknowledged that some protesters had no "obvious relationship to others," the Injunction impermissibly lumped all protest activities monolithically as "Operation Rescue."[10] J.A. 51; Pet. App. A-3. Such "guilt by association is philosophically alien to the traditions of a free society and the First Amendment itself." *Claiborne Hardware Co.*, 458 U.S. at 932.[11]

[9] *See, e.g., Claiborne Hardware Co.*, 458 U.S. at 886; *Carroll*, 393 U.S. at 175; *Gibbs*, 383 U.S. at 731-32; *Youngdahl v. Rainfair, Inc.*, 355 U.S. 131, 139 (1957); *Milk Wagon Drivers Union of Chicago, Local 753 v. Meadowmoor Dairies*, 312 U.S. 287 (1941).

[10] *Operation Rescue* was founded by Randall Terry. J.A. 340. *Operation Rescue National* was founded by Keith Tucci and operates the IMPACT training program. J.A. 42, 334, 335, 338, 340, 341, 379. *Rescue America* is an organization under the leadership of Don Treshman. J.A. 394. Though named as a party, *Operation Rescue America* never existed. J.A. 379, 393-94. 407. Though also named as a party, *Operation Goliath* is not an organization but was a campaign under the direction of Bruce Cadle which ceased in 1992. J.A. 322-23, 327.

[11] Though the 1992 injunction finds Petitioners are members of Operation Rescue and Operation Rescue America, the record testimony for the 1993 modification of that injunction established: (1) Petitioners were not members of Operation Rescue; (2) there was no organization called Operation Rescue America; and (3) Madsen, Martin and Hobbs were members of Rescue America which is separate and distinct from Operation Rescue. If it was uncontroverted that Petitioners were members of Operation Rescue, the statement made by counsel for Respondents is unexplainable: "Your Honor, I've said it more times than I can count. We are not seeking at this juncture to tie [Petitioners] to Operation Rescue. If

An injunction must "restrain only unlawful conduct and the persons responsible for conduct of that character." *Id.* at 924 n.67. In this case Petitioners engaged in no unlawful conduct.[12]

[Attorney Weiss] wants to represent Operation Rescue, that's a different matter. But as of right now, that distinction has been made clear, I think, throughout the examination of this witness." J.A. 198. As for the existence of Operation Rescue America, all the testimony before the trial court showed there was no such entity, but there was a Rescue America. J.A. 182, 379, 394-95, 407-08. When counsel for the Clinic learned of same, counsel stated, "We may need to take an amendment to conform with the evidence." J.A. 408. Respondents suggested the Injunction be amended to include the name Operation Rescue National, but that amendment was not adopted by the court. J.A. 79.

Judge McGregor was confused and had a problem "identifying for enforcement purposes . . . a proper legal entity that the court can subsequently deal with if there is [a] violation. And, I have a problem right now." J.A. 142. He remarked that it was "very troublesome dealing with organizations that are not legal entities." J.A. 168. He asked whether Operation Rescue was different than Operation Rescue America and was told by counsel there "isn't an Operation Rescue America. There's an organization Rescue America." J.A. 182. Twice the court asked Attorney Weiss who he represented, and was informed his clients were Rescue America, Madsen, Martin and Hobbs. J.A. 167, 579. At one point the court assumed that Meredith Raney was a defendant and began to introduce evidence against him, but then was informed he was not a defendant and was not a member of any of the organizations. J.A. 164, 185. Dr. Snydle testified that he felt, "They're all the same. It doesn't matter . . . . They're all one organization." J.A. 214. When asked if he based his feeling that they were all one organization on the assumption they were opposed to abortion, Snydle responded, "That is correct." J.A. 214. The organizational entities and their differences were explained on a number of occasions. J.A. 167, 182, 279, 323, 327, 334-40, 378-385, 394, 407-08, 427, 459.

[12] Even if Petitioners were members of Operation Rescue, which they deny, it is irrelevant because there was no showing that Operation Rescue undertook illegal activity, or that Petitioners actively advocated illegal aims. *See Claiborne Hardware Co.*, 458 U.S. at 920.

In 1991, after pro-life activity increased in Wichita, Kansas, Petitioner Martin issued a press release stating that "the spirit of Wichita comes to Florida." Respondents moved for a preemptive strike and obtained a TRO which prohibited blocking access to the named clinics. In July 1992, the parties stipulated that Petitioners never attempted to block access to any of the clinics. On September 30, 1992, the TRO became a permanent injunction.

The issue is whether Petitioners' activity *after* September 30, 1992, justified the entry of the Amended Permanent Injunction on April 8, 1993. Two events occurred during this period, neither of which relate to Petitioners. Operation Rescue National began the IMPACT Training School on or about January 18, 1993. J.A. 247. This school was to last twelve weeks, and as part of this training, individuals were invited to speak by Operation Rescue National, namely Randall Terry, Pat Mahoney, and others, none of whom were related to Petitioners. J.A. 342-45. Then on or about March 10, 1993, Dr. David Gunn was tragically killed in an unrelated incident at an abortion clinic in Pensacola, Florida. Respondent Aware brought two motions: (1) motion to hold in contempt those who had violated the 1992 injunction; and (2) motion to modify the 1992 injunction. The issue to be determined was whether Petitioners and other named defendants had violated the 1992 injunction such that it needed to be modified. As shown below, Petitioners never violated the 1992 injunction.

1. Petitioners as a group.

The trial court never made a specific finding that Petitioners violated the 1992 injunction. The Injunction states that despite the 1992 injunction, "there has been interference with ingress" by "some standing without any obvious relationship to others; some moving about, again without any obvious relationship to others; some holding signs, some not." J.A. 50-51. The order continues by noting: "Other persons would be standing, kneeling and sitting on the unpaved shoulder of the public right-of-way." J.A. 51. The findings never mention Petitioners or Rescue America by name. The Injunction is completely devoid of any finding that Petitioners

violated the 1992 injunction.

Cadle, Unterberger, Martin, and Allgeyer all testified that the IMPACT team was associated with Operation Rescue National and had no association with Petitioners. J.A. 279, 334, 335, 338, 340-44, 394, 427, 459, 494-95. The videotape[13] of the picketing on February 20, March 8, and March 13, 1993, did not show Petitioners or anyone affiliated with Rescue America. J.A. 395. Respondents stated that Arick's testimony involving the videotape "does not go against" Petitioners, J.A. 549, and stipulated that Arick "has no testimony on any violations on behalf of any of [Petitioners]", J.A. 578. Respondents further stated "we had nothing to present on any of [Petitioners]", J.A. 578-79, and that it has "been stipulated" that none of Petitioners have been charged with any crime. J.A. 591-92. Respondents added, "I also point out that all [of Arick's testimony regarding the videotape] is not something that relates to [Petitioners]." J.A. 602.

During Doyle's testimony regarding her apartment being picketed, Respondents stated that she "has not testified to any manner involving [Petitioners] in connection with these demonstrations," J.A. 507, that Doyle was "not going to testify as to [Petitioners]," J.A. 494, and that the testimony of Doyle had nothing to do with Petitioners but was directed to the IMPACT team and Cadle. J.A. 494-95.

During Snydle's testimony, Respondents stated they were not trying to link Petitioners with Operation Rescue. J.A. 198. Snydle

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[13] Ruth Arick, employed by Aware and paid by The Feminist Majority, testified that six to eight hours of video were edited under her discretion. J.A. 529, 531, 533. The video at the Clinic was taken on a day when Randall Terry of Operation Rescue and Eleanor Smeal of The Feminist Majority were present for a media heyday. J.A. 543, 559, 588. The tape was edited to focus on only "the kinds of activities that seem to be some of the most menacing and harassing" and stated that she left out pro-life singing and prayer, because such was not threatening, harassing, or intimidating. J.A. 595-97.

testified that he did not see Petitioners at the Comfort Inn. J.A. 173. In fact, the testimony of Snydle had little to do with Petitioners, as counsel stated, "there are other people against whom we are seeking contempt." J.A. 161. The so-called warning poster did not pertain to Petitioners. J.A. 163-64, 171.

During Captain Allgeyer's testimony, Respondents represented that Petitioners were not part of any traffic citations and were not involved in running motor vehicle license checks. J.A. 267, 307. Allgeyer testified that Petitioners had never been charged with trespass and does not recall seeing them at the Clinic. J.A. 275, 310. During Cadle's testimony Respondents stated that none of his testimony related to Petitioners. J.A. 331, 375.

2. Petitioner Madsen individually.

Petitioner Madsen did not testify during the 1993 hearing because counsel for the Clinic stated, "**I have already said that Judy Madsen is not a target of these contempt proceedings.**" J.A. 375 (emphasis added). Snydle testified Madsen had not been seen at the Clinic and had never blocked access. J.A. 192-93, 211. After the Clinic rested its case, counsel for Petitioner Madsen stated the following:

> WEISS: With respect to, I believe there has been a stipulation that Mrs. Madsen has not violated any of the court's injunction whatsoever. If I have got that cleared then --
>
> THE COURT: That's my understanding.

J.A. 436. Respondents acknowledged, and the court understood, that Madsen never violated the 1992 injunction. Yet, Judge McGregor carelessly lumped her in the Injunction knowing that she never engaged in illegal conduct. Injunctive relief against Madsen is blatantly unconstitutional.

3. Petitioner Martin individually.

Martin testified that he never trespassed, blocked access, or directed others to do so. J.A. 423-34. He never broke the 1992 injunction and does not feel that it is contrary to God's law because it allows for expressive activities. J.A. 430. He never saw Dr. Snydle or threatened him and has never been associated with Operation Rescue, Operation Goliath, Operation Rescue America, or Operation Rescue National. J.A. 426. He is not a part of the IMPACT team and has not been at the Clinic in two to three years. J.A. 427. Cadle confirmed that Martin never violated the 1992 injunction and had not seen Martin at the Clinic in more than two years. J.A. 376, 378.

One question raised against Martin was whether he distributed a brochure of Rescue America after the September 30, 1992 injunction, and if so, whether it advocated blocking access to the Clinic. Martin testified that Rescue America has four doctrines, the fourth being a rescue, but he subscribes to the first three which do not involve blocking access. J.A. 396. A portion of the brochure, which he did not write, stated that by blocking access to the entrance of an abortion clinic, the rescuer puts her body between the abortionist and the intended victim. J.A. 403-04. This brochure was published prior to the 1992 injunction. J.A. 423. Though it is disputed, Martin testified he did not distribute it after that injunction. J.A. 423, 429. He advocates prayer and never advocated blocking access to a clinic. J.A. 423-25. The brochure itself does not incite others to block access. Counsel for the Clinic confessed "some lack of clarity in the record in this respect," J.A. 441, and conceded there was "some confusion." J.A. 442.

Thus, the only allegations against Martin were whether he, on one occasion, stood in a driveway when Snydle tried to enter the Clinic,[14] and whether a brochure published prior to the 1992

[14] Snydle alleges he saw Martin at the Clinic. J.A. 144, 156, 211. Though he alleged Martin attempted to block the driveway, when asked specifically what Martin purportedly did, he responded, "He was walking back and forth across the parking lot entrance. And, as I tried to get in with my car, everybody just sort of stood there. I blew my horn several times and then progressed." J.A. 211. Snydle admitted that Martin had never assaulted him. J.A. 195.

injunction was distributed after the injunction, and if so, whether it incited blocking clinics. Martin testified he had not visited the Clinic and did not distribute the brochure after the 1992 injunction. J.A. 429. Even if he was at the Clinic, the evidence does not support blocking access and the brochure does not incite others to do so. *See Brandenburg v. Ohio*, 395 U.S. 444 (1969). The Injunction fails constitutional scrutiny.

4. Petitioner Hobbs individually.

Petitioner Hobbs never testified during the 1993 hearing. There was no need to because she did not violate the 1992 injunction. Only Captain Allgeyer testified regarding Hobbs. At one time he stated that Hobbs had received a traffic citation. J.A. 275, 276. However, when he made that statement, he was referring to a woman in the courtroom by the name of Shirley whom he looked at during the statement. On cross-examination, he acknowledged he did not know Shirley Hobbs but was referring to the Shirley sitting in the courtroom, who in fact was not Shirley Hobbs. Hobbs was not present. J.A. 285, 288. During Allgeyer's testimony, Respondents stated that Petitioners were not part of any traffic citation. J.A. 267. Allgeyer also testified the Petitioners had not trespassed or obstructed access. J.A. 275. There is no testimony implicating Petitioner Hobbs whatsoever. The Injunction against Hobbs is clearly unconstitutional.

B. The Injunction Is Not Precisely Tailored To The Exact Needs Of The Case.

According to the Florida Supreme Court, the asserted interests underlying the Injunction involve protecting abortion rights, insuring the public safety and order in promoting free flow of traffic, and protecting property rights. Abortion is a right protected only

against *governmental* interference. *See Bray v. Alexandria Women's Health Clinic*, 113 S.Ct. 753, 762, 764 (1993). No governmental entity is a party to this case. The conflict is between private parties. Abortion is not among the few rights protected against "private as well as official encroachment." *Bray*, 113 S.Ct. at 764. This Court has stated:

> It would be most peculiar to accord [abortion] that preferred position, since it is much less explicitly protected by the Constitution than, for example, the right of free speech . . . . Moreover, the right to abortion has been described in our opinions as one element of a more general right of privacy, or of Fourteenth Amendment liberty; and the other elements of those more general rights are obviously not protected against private infringement.

Id. (citations omitted).

Constitutional rights are protected only against governmental intrusion, cannot be asserted by Respondents, and therefore cannot be used to justify an underlying interest for the Injunction. *See amicus* brief of National Right to Life Committee, Inc. A department store cannot obtain an injunction against a burglar and raise Fourth or Fourteenth Amendment rights as justification for the injunction. Since the parties are private, it is impermissible to use constitutional rights to justify the underlying interest. Consequently, *this case is not about abortion rights*. Even if the Clinic could rely on the right to privacy, there is no evidence that the Clinic was closed, or that any person was permanently prevented from receiving an abortion. J.A. 54.[15]

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[15] Invasion of privacy is not sufficient to enjoin peaceful speech. *Keefe*, 402 U.S. at 419-20. Respondents and their *amici* argue for increased restrictions around medical facilities. R.B. 30-31. However, *NLRB v. Baptist Hospital, Inc.*, 442 U.S. 773 (1979), specifically noted that the prohibition of *solicitation* and distribution did not extend to the hospital's parking lots but applied only to areas *within* the buildings. 442 U.S. at 777 n.5. *Beth Israel Hospital v. NLRB*, 437 U.S. 483 (1978), specifically allowed *solicitation* and distribution *within* the cafeteria. 437 U.S. at 502-05.

Though Respondents refer to stalking patients, they only cite to the Injunction, which contains an erroneous finding since there is no testimony that any patient was ever stalked. J.A. 55; R.B. 10. As for the interest in property rights, Captain Allgeyer testified that Petitioners never trespassed or obstructed access. J.A. 275. No arrests and no citations have ever been issued for blocking access. J.A. 289-90. Allgeyer stated that the Melbourne police were competent to do their job, had enough personnel, and could handle the situation. J.A. 277-78. He also testified that in all of the newsclips he viewed, he never observed any illegal activity. J.A. 279.

By the testimony of the Clinic's own witnesses, Respondents' interest is to prohibit blocking access, threats, harassment, and intimidation. J.A. 597. Arick was not concerned with prayer or singing because these forms of speech were not threatening, harassing, or intimidating. J.A. 596-97. Doyle concedes that walking, carrying signs and kneeling to pray is a constitutional right, that prayer does not scare her but that marching, yelling, and name calling scares her. J.A. 517. Dr. Snydle testified peaceful picketing using signs probably would not cause much emotional stress. J.A. 203. The only asserted interest offered is to prohibit blocking access and shouting. The 1992 injunction protects the former and a simple noise restriction prohibiting willful shouting or sound amplification would be sufficient. The Injunction is not precisely tailored.

1. The thirty-six foot zone.

The Florida Supreme Court noted that "the present parties agree" that the forum at issue in this case constitutes "a traditional

public forum." Pet. Cert. A-13.[16]

Section (3) prohibits Petitioners and anyone acting "in concert" from "entering that portion of the public right-of-way" contained within the thirty-six foot zone. J.A. 57.[17] Respondents argue that

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[16] Respondents assume the sidewalk is a public forum but suggest that it resembles the sidewalk in *United States v. Kokinda*, 110 S.Ct. 3115 (1990). R.B. 14 n.17. The sidewalk in *Kokinda* ran parallel to the post office and was physically attached to its exterior wall separating the building from the parking lot. The sidewalk in this case is not attached to the Clinic and is not on private property. It has been used for walking and expressive activity. J.A. 474-75. The plurality distinguished the access sidewalk from the curbside sidewalk. *Kokinda*, 110 S.Ct. at 3120.

[17] Judge McGregor intended the "in concert" provision of the Injunction to apply to any pro-life individual whether or not they were aiding and abetting. This is the obvious purpose of the generic "WARNING" sign he directed to be posted at the Clinic. J.A. 61. The judge's remarks at the April 12, 1993 hearing after the entry of the Injunction underscore his obvious intention to apply the Injunction to any activities that "seem to be supportive of pro-life." J.A. 72. The Injunction, therefore, permanently eliminates all pro-life expression from the public sidewalk and right-of-way within the thirty-six foot zone. The point which Petitioners have raised is not the constitutionality of Federal Rule of Civil Procedure 65, but the constitutionality of the "in concert" provision as written and applied by Judge McGregor. Petitioners' Brief 27 n.19. Judge McGregor's application of this provision enjoins the entire world from expressing pro-life views. This is how the enforcement officials understood its application and the reason why they attempted to intervene for clarification. J.A. 83-84. Such a broad application of the term "in concert" is unconstitutional because it violates free speech and association. The Injunction's overbreadth allows Petitioners to challenge it on its face. *See Gunn v. University Committee to End War in Viet Nam*, 399 U.S. 383, 388-89 (1970) (when injunction applying to those acting in concert is "too vague to be understood, it can be a deadly one"); *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 112 (1969); *Regal Knitwear Co. v. NLRB*, 324 U.S. 9, 13 (1945) (a court "may not grant an enforceable order or injunction so broad as to make punishable the conduct of persons who act independently and whose rights have not been adjudged according

Petitioners can still carry on speech outside the thirty-six foot zone along U.S. Highway 1, but Unterberger, who is a local traffic engineer, testified that the slope along U.S. Highway 1 is extremely dangerous. J.A. 479-80, 482-83. To increase the number of people along U.S. Highway 1 increases the risk. J.A. 483. Captain Allgeyer stated that it would be deadly to pass out literature along U.S. Highway 1 and that it was a violation of local law to carry a sign along the median. J.A. 298, 313.

Respondents then argue that the thirty-six foot zone merely removes Petitioners from the sidewalk to the other side of Dixie Way. In making this allegation, Respondents concede that the public sidewalk is reserved only for pro-choice speech. Unterberger testified that it would be impossible to carry on a dialogue or to hand out literature on the other side of Dixie Way. J.A. 486. The only way to convey a message outside the thirty-six foot zone would be to shout or display an image, but that is prohibited by Section (4). Without risking arrest it is impossible to hand out literature outside the thirty-six foot zone. In that the interest is to maintain free access, the thirty-six foot zone flat ban on speech is not precisely tailored to the exact needs of the case. The 1992 injunction meets that interest along with Sections (1) and (2) of the 1993 Injunction, but the thirty-six foot zone misses the mark.

2. The sounds and images prohibition.

The restriction against sounds in Section (4) prohibits singing, chanting, whistling, shouting, yelling, use of bullhorns, sound amplification equipment or other sounds. J.A. 59.[18] The

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to the law"); *see also amicus curiae* Brief of The Rutherford Institute 5-11.

[18] While clearly defined volume restrictions have been upheld under certain circumstances, the restriction on singing, chanting, whistling or other sounds is not precisely tailored to the exact needs of the case. If the Clinic is truly concerned about sounds, then those associated with the Clinic do not show it by their actions. Many of the pro-choice protesters were shouting and highly vocal. J.A. 473. The pro-choice protesters use

restriction on sounds and images is during "the hours of 7:30 a.m. through noon, on Mondays through Saturdays, during surgical procedures and recovery periods." J.A. 59. The latter term is not defined. Respondents in the trial court acknowledged that the term was vague and requested that the court amend the Injunction to include "*(as posted at the Clinic)*." J.A. 79. Under the Injunction, it is impossible to determine when surgical procedures and recovery periods occur, and thus the Injunction acts as a total ban on any pro-life sound or image.

Respondents' Brief argues that Section (4) restricts only those images which can be observed when one climbs a ladder. R.B. 41 n.31. Respondents conceded during oral argument before the Florida Supreme Court that images can be observed within the Clinic without hoisting them over a fence. Respondents specifically requested the court to strike the words "images observable." J.A. 79. Until now, Respondents agreed that the term "images observable" should be removed.

As written, the Injunction restricts all pro-life images observable whether in or outside the forbidden zones. To say that the thirty-six foot zone merely moves pro-life speakers across the street ignores the restriction on images.[19] Respondents' contention

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bullhorns. J.A. 477. Moreover, the Clinic itself played loud music on its exterior. J.A. 273, 281, 282, 542, 545, 582, 597, 624.

[19] Respondents suggest that alternative means of communication exist because Petitioners can speak through advertisements, editorials, and distribute literature throughout other parts of Melbourne. R.B. 35-36. However, one "is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Schneider v. State*, 308 U.S. 147, 163 (1939). Petitioners have the "right not only to advocate their cause but also to select what they believe to be the most effective means of doing so." *Meyer v. Grant*, 486 U.S. 414, 424 (1988). Respondents and their *amici* suggest that since Aware is the only abortion clinic in Melbourne, it should receive protection from picketing and that the captive audience doctrine should apply. The

is similar to an argument rejected by this Court when the government contended that the restriction against picketing on the sidewalks around the United States Supreme Court was reasonable because it only restricted picketing in the vicinity of the Court and the picketers could go elsewhere throughout Washington, D.C. *See United States v. Grace*, 461 U.S. 171, 180-81 (1983). Like the restriction in *Grace*, the Injunction "totally banned the specified communicative activity on the public sidewalks around" the Clinic. *Id.* at 181. It "cannot be justified as a reasonable place restriction." *Id.* Of what use is picketing in front of the wrong building? Offering a leaflet to someone who is far removed? To do so would be like addressing an audience with your back towards them or speaking with a gag over your mouth.

3. The three-hundred foot zone around the Clinic.

Section (5) creates a three-hundred foot zone around the Clinic and prohibits "physically approaching any person seeking the services of the Clinic unless such person indicates a desire to communicate by approaching or by inquiring." J.A. 59. Invited conversation must be "of a non-threatening nature." Respondents argue that this is merely a traffic regulation, but there is no evidence there was a traffic problem three-hundred feet away from the Clinic. It is inconceivable how this three-hundred foot zone encompassing 6.49 acres of property has anything to do with traffic. This section

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fact it is the only clinic in Melbourne strengthens Petitioners' argument that it is not reasonable to force their speech to the other side of the city. Outside the context of a home, the captive audience doctrine has never been applied in a traditional public forum. Respondents' use of the captive audience doctrine outside of the context of a home within a traditional public forum would result in the extinction of public fora. The captive audience doctrine does not apply in a residential area to a business operating out of a home. *Frisby v. Schultz*, 487 U.S. 474, 488 (1988). The decision in *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974), does not extend the captive audience doctrine outside a home because that case involved political advertisements in a nonpublic forum. *Id.* at 303.

also prohibits sidewalk counseling, J.A. 59, which Wymer testified was peaceful communication. J.A. 612, 613. *See amicus* brief of The Southern Center for Law & Ethics. Respondents argue that "helpful" and "nonoffensive" sidewalk counseling is not prohibited. R.B. 42. While that may be their view, that is not what Section (5) says. All sidewalk counseling is prohibited unless the recipient shows a desire to communicate by approaching or inquiring. There is no justification for this restriction. It is not precisely tailored.

4. The three-hundred foot zone around residential areas.

Section (6) creates a three-hundred foot zone around the residence of any of the Clinic's employees, staff, owners or agents. J.A. 59-60. That section restricts approaching, congregating, picketing, patrolling, and demonstrating.[20] This restriction goes far beyond that permitted by *Frisby*, 487 U.S. at 474. Within this 6.49 acre silence zone no pro-life speaker can approach anyone to carry on peaceful pro-life speech or pass out literature. Petitioners never engaged in residential picketing. J.A. 494-95, 507. This restriction unconstitutionally prohibits peaceful and orderly marching. *See Gregory v. City of Chicago*, 394 U.S. 111, 112 (1969). The Injunction is not precisely tailored.

5. The invited contact prohibition.

Outside the thirty-six foot zone the Injunction provides for "invited contact." J.A. 63. This restriction on speech extends far beyond the three-hundred foot zones. Invited contact is defined as conduct by the person sought to be contacted which "affirmatively indicates a desire to engage in conversation or to receive literature."

[20] Section (6) also prohibits attempting to block access to the entrances or exits of the residences. There is absolutely no evidence that ingress or egress to any residential area was ever blocked. Moreover, since Windle and Doyle, as owner and employee of the Clinic, live in an apartment and condominium respectively, this restriction shuts down an entire complex for pro-life speech.

J.A. 63. This affirmative indication can be evidenced by the person physically approaching or where such person extends a hand to receive literature or speaks words "indicating a positive interest." J.A. 63. After speech is initiated by the pro-choice speaker, speech can be silenced by withdrawing the license. There is absolutely no basis for this restriction. The Injunction cannot be considered precisely tailored to the exact needs of the case.[21]

Judged against this Court's precedents regarding injunctive relief involving speech, the Injunction is unconstitutional. Respondents cannot honestly represent that the Injunction is necessary to restrain Petitioner Madsen's activities when Respondents stipulated that the contempt hearing did not involve her. J.A. 375, 436. Petitioner Hobbs engaged in no illegal activity that required restraint on her speech. Petitioner Martin testified he was not at the Clinic, had not blocked access to the Clinic, and had not advocated others to do so. Even if the testimony of Snydle puts Martin at the Clinic on one occasion, his activities were not illegal. Even if Martin distributed the Rescue America brochure after the 1992 injunction, it does not incite illegal activities and he specifically repudiated blocking access. *See Memphis Light, Gas & Water Division v. Craft*, 436 U.S. 1, 8 (1978); *New York Times Co.*, 376 U.S. at 285.

The Injunction does not serve an essential governmental purpose involving privacy, property rights, or public order. The right of privacy cannot be raised as a governmental interest by private parties, and even if it could, Petitioners did not invade that right. Petitioners pose no property harm or threat to the public order. The 1992 injunction protects the Clinic. The 1993 Injunction challenged here violates precious freedoms. The Respondents would have this Court weaken the first amendment by

[21] Since injunctions must be precisely tailored to the exact needs of a case, they are not immune from vague and overbreadth challenges. The vague and overbreadth deficiencies of the Injunction point out that the Injunction is not narrowly tailored to the precise needs of the case. *See* Petitioners' Brief 24-37.

sanctioning the proposition of "hear no evil, see no evil, speak no evil." If "absolute assurance of tranquility is required, we may as well forget about free speech." *City of Houston v. Hill*, 482 U.S. 451, 462 n.11 (1987) (quoting *Spence v. Washington*, 418 U.S. 405, 416 (1974)) (editing remarks and citations omitted).

While dissidents elsewhere face legal sanctions of every stripe, in the United States the right to free speech belongs to the politically correct and incorrect, the disaffected as well as the loyal, the obnoxious as well as the sensitive, the vociferous as well as the meek. *See, e.g., Forsyth County*, 112 S.Ct. at 2395 (racist march); *Texas v. Johnson*, 491 U.S. 397 (1989) (flag burning); *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988) (lewd parody); *Claiborne Hardware Co.*, 458 U.S. at 886 (aggressive boycott enforced with threats of ostracism). The Injunction at issue represents a dramatic betrayal of the national promise of liberty to speak, to protest, to challenge, to unsettle the status quo.

CONCLUSION

In light of the above, this Court should reverse the judgment of the Florida Supreme Court.

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April 15, 1994

(24)

Docket No. 93-880

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

JUDY MADSEN, ED MARTIN and SHIRLEY HOBBS,
Petitioners,

v.

WOMEN'S HEALTH CENTER, INC., et al.,
Respondents.

On Writ of Certiorari
to the Supreme Court of Florida

Petitioners' Response to Solicitor General's Motion for Leave to Participate in Oral Argument and for Divided Argument

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I.

THE SOLICITOR GENERAL'S INTEREST IN INTERVENING AND PRESENTING ORAL ARGUMENT BASED ON INSURING ADEQUATE JUDICIAL RELIEF AND ACCESS TO ABORTION CLINICS IS NOT IMPLICATED OR AFFECTED BY *MADSEN*.

Pursuant to Rules 28.4 and 28.7 of the Rules of this Court, the Solicitor General, on behalf of the United States as *amicus curiae*, moved this Court to divide the Respondents' allotted time for oral argument. The Solicitor General's stated interest in intervening is "ensuring that adequate judicial relief is available to ensure access to medical clinics and patients engaged in providing and obtaining abortion-related services." The Solicitor General's primary interest is to assure that individuals are not permitted to block access to abortion-related

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facilities. However, that interest is not implicated or affected by *Madsen* as it is not challenged in this case. In ***Madsen***, the September 30, 1992, Permanent Injunction fully protects the interests stated by the Solicitor General. That injunction enjoined:

> 1) trespassing on, sitting in, blocking, impeding or obstructing ingress into or egress from any facility at which abortions are performed in Brevard and Seminole County, Florida;
>
> 2) physically abusing persons entering, leaving, working or using any services of any facility at which abortions are performed in Brevard and Seminole County, Florida; and,
>
> 3) attempting or directing others to take any of the actions described in Paragraphs 1 and 2 above.

J.A. 9.

The Petitioners in *Madsen* do not challenge the September 30, 1992, permanent injunction and have requested this Court to return to that injunction, which only prohibits blocking access to or egress from the Clinic, but does not prohibit protected first amendment speech and activities. Petitioners' brief stated that:

> The 1992 permanent injunction adequately protects the Clinic, the patients, and the public without infringing on free expression. The 1993 Injunction violates the first amendment and this Court should find it unconstitutional. Striking the 1993 Injunction does not affect the 1992 permanent injunction, which is not challenged here, and therefore the Clinic's interest would still be protected and the right to free speech would not be violated.

Pet. Br. 43.

The Solicitor General's stated interest is "to ensure access to medical clinics and patients engaged in providing and obtaining abortion-related services." The Solicitor General's reason for requesting oral argument is related to blocking clinics. The only controversy within *Madsen* is related to the first amendment free speech and freedom of association rights denied

by the 1993 Amended Permanent Injunction. In their brief, Petitioners assert this Court should strike the 1993 Amended Permanent Injunction and allow the 1992 permanent injunction to remain in force. *See* Pet. Br. 43 and 49. The only issue facing this Court is pure free speech, not blocking access to clinics. The interest of the Solicitor General will be adequately protected by the Respondents. Therefore, the Petitioners respectfully request this Court deny the Solicitor General's Motion for Leave to Participate in Oral Argument and for Divided Argument.

II.

THE SOLICITOR GENERAL'S STATED INTEREST IN THE PENDING FACE LEGISLATION IS ILLUSORY AND HIGHLY SPECULATIVE.

The Solicitor General's stated interest under FACE is that the "constitutional analysis that is applied by the Court in resolving this case may have a direct bearing on the validity and interpretation of that legislation." Initially, FACE is limited to prohibiting those who "by force, threat of force, or physical obstruction, intentionally injures, intimidates, or interferes with any person, or attempts to do so, because that person or any other person or class of persons is obtaining or providing reproductive health services." H.R. 796, 103d Cong., 1st Sess. § 2(a)(1) (1993). The purported purpose behind the FACE legislation is to prevent blocking access to clinics.

The purpose of the *Madsen* case is to redress the first amendment free speech and free association rights of the Petitioners. As noted, *supra*, this case does not advocate or support the blocking of ingress to or egress from medical clinics.

The parties in this case are not subject to FACE, nor was FACE an issue at any time during the lower court proceedings. The Solicitor General's stated interest in protecting that pending legislation is therefore illusory and highly speculative.

The Solicitor General's stated interest is also illusory and high speculative because FACE is *pending* legislation. It would be highly unusual for the Solicitor General to intervene and demand oral advocacy supporting a piece of pending legislation still undergoing revision in committee. While under debate, FACE is subject to substantial modification and revision before enactment. Moreover, the FACE legislation may never be enacted in this session, or in the future. Finally, the Solicitor General's request implies an advisory opinion by this Court on the "validity and interpretation of that legislation." In essence, the Solicitor General aspires to request this Court's validation of FACE before enactment. The interest of the Solicitor General can certainly be presented in a brief *amicus curiae* but there is clearly no reason to grant the Solicitor General opportunity for oral argument.

WHEREFORE, Petitioners, Judy Madsen, Ed Martin and Shirley Hobbs, respectfully request this Court to deny the Solicitor General's Motion for Leave to Participate in Oral Argument and for Divided Argument.

I HEREBY CERTIFY that a copy of the foregoing has been furnished this 23rd day of March, 1994, by U.S. Mail to:

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No. 93-880

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

JUDY MADSEN, ED MARTIN, and SHIRLEY HOBBS,
Petitioners,

v.

WOMEN'S HEALTH CENTER, INC.,
AWARE WOMAN CENTER FOR CHOICE, INC.,
EPOC CLINIC, INC., and CENTRAL FLORIDA
WOMEN'S HEALTH ORGANIZATION, INC.,
Respondents.

On Writ of Certiorari to the Supreme Court of Florida

BRIEF FOR PETITIONERS

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a state court injunction placing a thirty-six foot buffer zone around an abortion clinic which prohibits peaceful pro-life speech in a traditional public forum is an unconstitutional content-based restriction on free speech and association.

2. Whether a state court injunction creating a consent requirement before speech is permitted within a three-hundred foot buffer zone around an abortion clinic and residential areas is a reasonable time, place, and manner restriction or an unconstitutional prior restraint on free speech.

3. Whether a state court injunction prohibiting named demonstrators and those acting "in concert" from expressing peaceful speech within several designated buffer zones violates the first amendment's protection of freedom of speech and association.

RULE 29.1 STATEMENT

Respondents are all incorporated in Florida and do not have parent or subsidiary companies.

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IN THE

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OCTOBER TERM, 1993

JUDY MADSEN, ED MARTIN, and SHIRLEY HOBBS,

Petitioners,

v.

**WOMEN'S HEALTH CENTER, INC.,
AWARE WOMAN CENTER FOR CHOICE, INC.,
EPOC CLINIC, INC., and CENTRAL FLORIDA
WOMEN'S HEALTH ORGANIZATION, INC.,**

Respondents.

**On Writ of Certiorari to the
Supreme Court of Florida**

BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the Florida Supreme Court is reported as *Operation Rescue, et al. v. Women's Health Center, Inc., et al.*, 626 So. 2d 664 (Fla. 1993), and is reproduced as Appendix A to the Petition for Writ of Certiorari.

The opinion of the Eighteenth Judicial Circuit of Florida granting the Amended Permanent Injunction challenged herein is not reported, but is reproduced in the Joint Appendix. J.A. 50.

STATEMENT OF JURISDICTION

The Florida Supreme Court entered its opinion on October 28, 1993. Petitioners filed their Petition for Writ of Certiorari on December 3, 1993, which this Court granted on January 21, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(a).

CONSTITUTIONAL PROVISION AND INJUNCTION AT ISSUE

This case involves the first amendment[1] to the United States Constitution, which provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for redress of grievances.

U.S. Const. amend. I.

This case presents constitutional challenges to the Eighteenth

[1] The fourteenth amendment is also implicated because the Injunction is vague, overbroad, and content-based. *Burson v. Freeman*, 112 S.Ct. 1846 (1992); *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972); *Coates v. City of Cincinnati*, 402 U.S. 611 (1971).

Judicial Circuit of Florida's Amended Permanent Injunction dated April 8, 1993. J.A. 50.

STATEMENT OF THE CASE

A. The Amended Permanent Injunction

Petitioners challenge the constitutionality of an Amended Permanent Injunction (hereinafter "Injunction") entered on April 8, 1993, by the Honorable Robert B. McGregor, Circuit Judge in the Eighteenth Judicial Circuit of Florida, against Operation Rescue, other pro-life groups, individuals, Petitioners, and those acting "in concert."

In this case Respondents are abortion clinics located in Central Florida. Petitioners are opposed to abortion. Certain individuals demonstrated outside the Aware Woman Center for Choice (hereinafter "Aware" or the "Clinic") expressing their opposition to abortion. Petitioners were not associated with those protesters or with Operation Rescue. Respondents requested injunctive relief enjoining Petitioners and others from trespassing, blocking, or obstructing ingress into or egress from Respondents' abortion facilities.

On July 30, 1992, the parties stipulated that Petitioners had never blocked access to the clinics. On September 30, 1992, the court entered an order granting a permanent injunction against the Petitioners and others. J.A. 5. The 1992 permanent injunction prohibits trespassing on, sitting in, blocking, impeding or obstructing ingress into or egress from any abortion clinic in Brevard and Seminole County, physically abusing persons entering, leaving, or using any services of any abortion facility. J.A. 9.

On March 22, 1993, only Aware moved for a modification of the permanent injunction. On April 8, 1993, the court entered the Amended Permanent Injunction which is the subject of this action. The 1993 Injunction incorporates the language of the 1992 permanent injunction but adds a thirty-six foot zone around the

Clinic property in which is contained a public sidewalk, right-of-way, and highway. The Injunction also adds a three-hundred foot zone around the Clinic and the residences of any employee, staff, owner, or agent of the Clinic. The Injunction further forbids singing, chanting, whistling, shouting, yelling, sounds, images observable, leafletting, congregating, picketing, patrolling, and demonstrating. It restricts speech that is intimidating, encouraging, or inciting. Non-threatening speech is permitted only with those who show a desire to communicate by approaching, inquiring or inviting contact. Speech must end when the listener expresses words that indicate a desire to end the contact, or words or actions of similar import. J.A. 56-64.

B. The Decision of the Supreme Court of Florida

On October 28, 1993, in *Operation Rescue, et al. v. Women's Health Center, Inc., et al.*, 626 So. 2d 664 (Fla. 1993), the Florida Supreme Court concluded that the Injunction encompassed a traditional public forum, was content neutral, and was a permissible time, place, and manner restriction. The court noted the Injunction could be narrowed, but declined to narrow its reach. The court rejected the prior restraint argument concluding that a prior restraint challenge was inapplicable in the absence of a content-based restriction.

Rejecting a challenge based on vagueness or overbreadth, the court stated that "sounds or images observable to or within earshot of the patients inside the Clinic" was sufficiently specific to give proper notice of what would be considered illegal. As to overbreadth, the court stated that the phrase "in active concert or participation" created no danger that the Injunction would be unfairly enforced. The court recognized *Cheffer v. McGregor*, 6 F.3d 705 (11th Cir. 1993), but without comment. Pet. App. C. The *Cheffer* case involved a person not a party to the Injunction who feared arrest because it had been applied to anyone expressing a pro-life view through the phrase "in concert." On October 20, 1993, the Eleventh Circuit Court of Appeals held the Injunction was a viewpoint-based restriction in a traditional public forum. The

court noted that a viewpoint-specific restriction in a traditional public forum is unconstitutional unless it is necessary to serve a compelling state interest and it is narrowly drawn to achieve that end. The Injunction did not meet either test. Pet. App. C.

SUMMARY OF ARGUMENT

The Injunction violates Petitioners' First and Fourteenth Amendment rights. As applied and on its face, the Injunction is content and viewpoint-based, is not necessary to serve a compelling state interest, nor narrowly drawn to achieve that end. The Injunction fails the *O'Brien* and the time, place, and manner tests. The Injunction is also overbroad and vague. Subjecting numerous people not associated with those named in the Injunction to arrest proves that the Injunction is substantially overbroad. Since free speech is at stake, precision of drafting and clarity is essential. The Injunction also acts as a classic prior restraint and violates Petitioners' right to free association.

The Injunction is content and viewpoint-based. Judge McGregor admitted the Injunction censors only pro-life speech. Since the Injunction prohibits "images observable," enforcement requires a content analysis. A "For Sale" sign next to the Clinic is permitted, but a "Choose Life" sign violates the Injunction. The Injunction allows only invited speech of a "non-threatening" nature. The term "non-threatening" is content-based because speech is restricted by the reaction of the listener.

The Injunction is also viewpoint-based. Not only does the Injunction violate a broad class of speech (abortion), but it further restricts a subclass of that speech (anti-abortion). The Injunction has licensed one side of the debate, allowing pro-choice but not pro-life speech. If an "agent" of the Clinic or a person "seeking the services of the Clinic" is not "interested" in the content of the speech, then that person can censor the speech. Censorship occurs based on whether the speech is opposed to abortion. Government may not regulate in ways that favor some viewpoints at the expense of others.

The Injunction is not necessary and is not narrowly drawn to achieve a compelling state interest. One of the stated interests is the right to abortion. The right of Petitioners is the right to free speech. There is no evidence that any woman was prevented from obtaining an abortion. If reasonable state regulations designed to persuade a woman to choose childbirth over abortion will be upheld, then individual free speech of similar persuasion cannot be prohibited. The clash is between an actual prohibition of speech and a potential hindrance to the free exercise of abortion. However, the state already has numerous laws protecting personal safety, public order, free flow of traffic, and property rights. The 1992 permanent injunction, which is not challenged here, protects the interests of the Clinic and patients while not restricting free speech. Likewise, Sections (1) and (2) of the Injunction rightfully balance these interests, but Sections (3) through (9) squelch free speech and are not necessary to achieve any governmental interests. The Injunction is not necessary, not narrowly tailored and not the least restrictive means.

The Injunction also fails the *O'Brien* and the time, place, and manner tests. The *O'Brien* test is inapplicable since the Injunction regulates speech. The time, place, and manner test has never been applied by this Court to injunctions. However, even if this test were appropriate, the Injunction is anything but reasonable. It acts as a prior restraint and proscribes more speech than is necessary to achieve any stated interest. The Injunction flatly bans speech within the thirty-six foot zone, images observable, and all other speech outside the thirty-six foot zone at the discretion of the listener. No other alternative means of communication is available to Petitioners.

The Injunction requires the arrest of all pro-life persons penetrating the forbidden zone. While Sections (1) and (2) apply to otherwise illegal activities and thus do not violate constitutional liberties, Sections (3) through (9) provide no tangible criteria for enforcement officials to follow.

The Injunction prohibits sounds, whether willful or not, and images which can be seen within the Clinic. The three-hundred foot

radius, encompassing 6.49 acres, applies to the Clinic and to residential areas. It further prohibits "crowding" and language that is "intimidating," "harassing," or "encouraging." The Injunction further applies outside the three-hundred foot zone, allowing speech only if the listener shows a positive interest.

The Injunction is vague. The phrase "acting in concert" is problematic for law enforcement officials. Police officers have understood the Injunction to require the arrest of any pro-life individual entering the forbidden zone. Clinic "agents" point out pro-life individuals for arrest. The Injunction restricts free expression around "agents," but never defines the term. It prohibits speech "during surgical procedures and recovery periods" without stating when these times begin or end. The Injunction prohibits all "images observable." A pro-life person is prohibited from approaching any person "seeking the services of the Clinic." A pro-life speaker is not able to determine who is "seeking the services of the Clinic" one-hundred yards away. If permission to speak is granted, the conversation must be of a "non-threatening" nature. "Sidewalk counseling" is prohibited but is never defined. While allowing "invited contact," a pro-life speaker is unable to determine when consent to speak has ended.

The Injunction acts as a classic prior restraint. It flatly prohibits speech within the thirty-six foot zone and outside the thirty-six foot zone if it is "intimidating," "encouraging," not "invited," or if the listener has no "interest" in the content. The threat of prosecution under the Injunction chills speech.

The breadth of the Injunction violates Petitioners' right to free association by penalizing all persons having a pro-life viewpoint by eradicating group advocacy. Petitioners are lumped together with certain named and unnamed individuals simply because they share a pro-life belief. Petitioners are not members of Operation Rescue, yet the alleged acts of Operation Rescue are imputed to Petitioners. Petitioners have not been disruptive, nor have they created violence, but because of some other alleged disruptive activity Petitioners have lost their right to speak and associate. The Injunction places

a blanket prohibition on pro-life association.

The 1992 permanent injunction, which is not challenged here, protects the Clinic's interest without infringing Petitioners' free speech. The 1993 Injunction goes beyond the interest asserted and violates the first amendment. This Court should therefore find the Injunction unconstitutional, and in so doing, the 1992 permanent injunction will remain to protect any government interest.

ARGUMENT

I.

THE INJUNCTION VIOLATES PETITIONERS' RIGHT TO FREE SPEECH.

The founding fathers "believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth . . . . Believing the power of reason as applied through public discussion, they eschewed silence coerced by law--the argument of force in its worse form." *Whitney v. California*, 274 U.S. 357, 374-75 (1929) (Brandeis, J., concurring). Such reverence for free speech is nowhere more important than in quintessential public fora which from time immemorial have been open for public debate. The Eleventh Circuit and the Florida Supreme Court agreed that the Injunction affected a traditional public forum--specifically the public streets and sidewalk surrounding the Clinic. *Frisby v. Schultz*, 487 U.S. 474, 479, (1988); *ISKCON v. Lee*, 112 S.Ct. 2711, 2716-17 (1992) (Kennedy, J., concurring); *Perry Education Association v. Perry Local Educators' Association*, 460 U.S. 37, 45 (1983).

A. The Injunction Is Content And Viewpoint-Based, Is Not Necessary To Serve A Compelling State Interest And Is Not Narrowly Drawn To Achieve That End.

It is undisputed that the Injunction restricts speech within a traditional public forum. Therefore, if the Injunction is content-

based, it must satisfy strict scrutiny. The Injunction must be necessary to serve a compelling state interest and must be narrowly drawn to achieve that end. *See Perry*, 460 U.S. at 45. The Injunction is both content *and* viewpoint-based. After singling out abortion related speech, the Injunction allows pro-choice speech but prohibits pro-life expression.

1. The Injunction is both content and viewpoint-based.

"The First Amendment generally prevents government from proscribing speech, or even expressive conduct, because of disapproval of the ideas expressed. Content-based regulations are presumptively invalid." *R.A.V. v. City of St. Paul*, 112 S.Ct. 2538, 2542 (1992). "If there is a bedrock principle underlying the First Amendment, it is that government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Simon & Schuster v. New York Crime Victims Board*, 112 S.Ct. 501, 509 (1991).

Clearly the "government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favorable or more controversial views." *Police Department of Chicago v. Mosley*, 408 U.S. 92, 95-96 (1972); *see also Lamb's Chapel v. Center Moriches Union Free School District*, 113 S.Ct. 2141 (1993); *Widmar v. Vincent*, 454 U.S. 263 (1981). Content-based regulations simply cannot be tolerated. *See Forsyth County v. The Nationalist Movement*, 112 S.Ct. 2395, 2404 (1992); *Regan v. Time, Inc.*, 468 U.S. 641, 648-49 (1984). Stressing its disdain for content-based prohibitions, this Court stated that "[a]ny restriction on expressive activity because of its content would completely undercut the 'profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide open.'" *Mosley*, 408 U.S. at 95-96 (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270

(1963)).[2]

To be content neutral, the Injunction must apply equally to all forms of speech.[3] Content neutral regulations are those that are "justified without reference to the content of the regulated speech." *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976). As admitted by Judge McGregor, the Injunction only censors people holding pro-life beliefs.[4] To Mr. Lacy, Judge McGregor stated that the Injunction

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[2] "Regulations which permit the government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment." *Simon & Schuster*, 112 S.Ct. at 508. Content-based regulations of speech constitute "censorship in a most odious form" and clearly violate the first amendment. *Cox v. Louisiana*, 379 U.S. 536, 581 (1965) (Black, J., concurring). "Education is the proper and preferable alternative to censorship." *Whitney*, 274 U.S. at 360.

[3] "Content-based restrictions also have been held to raise Fourteenth Amendment equal-protection concerns because, in the course of regulating speech, such restrictions differentiate between types of speech." *Burson v. Freeman*, 112 S.Ct. 1846, 1850 n.3 (1993). The Injunction deprives Petitioners of fundamental rights because free speech is "among the fundamental personal rights and liberties which [is] protected by the Fourteenth Amendment from invasion by state action." *Lovell v. Griffin*, 303 U.S. 444, 450 (1938). The Injunction clearly classifies individuals based upon pro-life or pro-choice expression. Such class-based discrimination violates free speech and equal protection. *See also Burlington Northern R. Co. v. Ford*, 112 S.Ct. 2184 (1992).

[4] This Court "must consider [Judge McGregor's] authoritative constructions of the [Injunction], including [his] own implementation and interpretation of it. In the present litigation, the [Judge] has made clear how [he] interprets and implements the [Injunction]." *Forsyth County*, 112 S.Ct. at 2402 (citations omitted); *see also Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750 (1988). This Court has the authority to conduct its own *de novo* review. *Peel v. A. Horney Registration & Disciplinary Commission of Illinois*, 110 S.Ct. 2281, 2291-92 (1990); *Bose Corp. v. Consumers United of United States, Inc.*, 466 U.S. 485, 509

"did not pertain to those on the other side of the issue." J.A. 71. When John Doe No. 16 asked upon what basis was the determination to arrest made, Judge McGregor responded by saying the Injunction applied to those who "seemed to be supportive of pro-life." J.A. 72. John Doe No. 16 asked Judge McGregor if he intended that the Injunction "would apply only to people that were demonstrating that were pro-life?" To which Judge McGregor responded: "In effect, yes." J.A. 74. After John Doe No. 31 was arrested, he told Judge McGregor he had never seen the Injunction. The judge responded that it applied to those of a "pro-life position" and stated that if John Doe No. 31 was actually pro-choice "perhaps the prosecutor wouldn't bring the formal charge." J.A. 77.

"Several of those arrested testified (at a preliminary hearing convened by Judge McGregor as provided for in the Injunction) that they were designated for arrest by Clinic workers and police officers because they were perceived to be 'pro-life'." *Cheffer v. McGregor*, 6 F.3d 705, 711 n.11. (11th Cir. 1993). The Eleventh Circuit found:

> Judge McGregor accepted this interpretation of the intent of the Injunction and explained (to the arrestees): "[T]he Injunction did not pertain to those on the other side of the issue, because the word 'in concert with' means in concert with those who had taken a certain position in respect to the Clinic, adverse to the Clinic. *If you are saying that is [the] selective basis that the pro-choice were not arrested when pro-life was arrested, that's the basis of that selection.*"

Id. (emphasis supplied).

Section (4) prohibits **images observable** to patients inside the Clinic. Obviously this section is not intended to restrict "For Sale" signs, political signs, street signs, billboards, or birthday party signs

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(1984); *Edwards v. South Carolina*, 372 U.S. 229, 235 (1963).

on someone's property. The images prohibited are signs such as "Baby Killer," "Child Murderer," or "Choose Life." Since the Injunction restricts "images observable," applying the phrase "in concert" requires a content-based decision. If the image supports the views of those named in the Injunction, then the image is banned. There is no other way to relate those acting in concert with the restriction on images other than to make a content-based classification.

Section (5) allows **invited** speech, but only of a **non-threatening nature**. Asking directions of a person seeking the services of the Clinic, or asking the time of day, normally should be non-threatening, but what if the conversation occurred in the early twilight hours when few other people were around? If the person felt threatened, does the Injunction apply? What if the encounter involved handing the same person pro-life literature, or if the pro-life person said, "Don't kill your baby!" The fact that the answer to these questions depends on the listener's reaction makes the Injunction content-based. "Listeners' reaction to speech is not a content-neutral basis for regulation." *Forsyth County*, 112 S.Ct. at 2403.

Certainly Section (6) would not prohibit labor pickets, anti-nuclear pickets, or an environmental protester, but it would prohibit the lone pro-life picketer. In *Johnson*, this Court overturned a flag burning conviction because prosecution "depended on the likely communicative impact" of expressive conduct. *Texas v. Johnson*, 491 U.S. 397, 411 (1989). Such restrictions are content-based. The Injunction silences speech based on the reaction of the listener. "The emotive impact of speech on its audience is not . . . unrelated to the content of the expression itself." *Boos v. Barry*, 485 U.S. 312, 321 (1988).

Both the state judge drafting the Injunction and police officers arresting pro-life speakers have enforced the Injunction on the basis of the content of speech. Pro-life demonstrators are arrested for violating the Injunction, while pro-choice demonstrators are not. J.A. 71, 74, 77. The sole determining factor is whether the person

in the no speech zone holds a pro-life belief. "The practical effect of [the "in concert"] section of the Injunction was to assure that while 'pro-life' speakers would be arrested, 'pro-choice' demonstrators would not." *Cheffer*, 6 F.3d at 711.

Judge McGregor indicated the Injunction was intended to prohibit picketing and demonstrations by all persons who identified themselves as pro-life. He also stated that those having pro-choice beliefs were free to be on the public sidewalk and right-of-way without violating the Injunction. J.A. 72. In application, pro-choice and pro-life persons have stood side-by-side, one being arrested and one not. J.A. 75. Such a one-sided proscription of speech is clear evidence that the Injunction is content-based and presumptively invalid. *See R.A.V.*, 112 S.Ct. at 2542.

The Injunction's restriction of pro-life speech and exemption of pro-choice speech establishes that it is not viewpoint-neutral. The Eleventh Circuit stated:

> The order enjoins Operation Rescue, Operation Rescue America, Operation Goliath, their officers, agents, members, employees and servants, and Ed Martin, Bruce Cadle, Pat Mahoney, Randall Terry, Judy Madsen, and Shirley Hobbs, and all persons acting in concert or participation with them or on their behalf . . . . Such a restriction is no more viewpoint-neutral than one restricting the speech of "the Republican party, the state Republican party, George Bush, Bob Dole, Jack Kemp and all persons acting in concert or participation with them or on their behalf."

Cheffer, 6 F.3d at 710-11.

Not only is the Injunction content-based, it is also viewpoint-based. The Injunction not only regulates a broad class of speech (abortion speech), but further restricts a subclass of that speech (anti-abortion speech) "based on hostility--or favoritism--towards the underlying message expressed." *R.A.V.*, 112 S.Ct. at 2545. The

state "has no authority to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensbury Rules." *Id.* at 2548. The Injunction allows speech favoring abortion rights because such would be non-threatening to the person seeking the services of the Clinic, but restricts pro-life speech. Thus, within the category of abortion speech, only speech favoring abortion is permitted while speech opposing abortion is damned. For example, the decretal portion of the Injunction speaks of "invited contact" which is permissible outside of the zones but only if the person sought to be contacted physically approaches and indicates "a positive interest" in what is being said. J.A. 63. *See Schacht v. United States*, 398 U.S. 58, 63 (1970) (statute "which leaves Americans free to praise the war in Vietnam but can send persons . . . to prison for opposing it, cannot survive in a country which has the First Amendment"); *see also Johnson*, 491 U.S. at 417. This differential treatment based upon viewpoint should meet with *exacting scrutiny*. *See R.A.V.*, 112 S.Ct. at 2544, 2546; *Simon & Schuster*, 112 S.Ct. at 508; *Boos*, 485 U.S. at 320-22. The government may not regulate speech "in ways that favor some viewpoints or ideas at the expense of others." *Members of the City Council of City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 787, 804 (1984).

The Injunction enacts a sweeping ban of pro-life speech in a traditional public forum. No such ban exists on pro-choice speech. Such differential treatment and denial of access to a traditional public forum based upon content and viewpoint is unconstitutional. *See City of Cincinnati v. Discovery Network, Inc.*, 113 S.Ct. 1505 (1993).

2. The Injunction is not necessary and not narrowly drawn to serve a compelling state interest.

"The danger of censorship presented by content-based [regulation] requires that the weapon be employed only where it is necessary to serve the asserted compelling interest." *R.A.V.*, 112 S.Ct. at 2549 (citing *Leathers v. Medlock*, 111 S.Ct. 1438, 1444 (1991)). A restriction on free speech must not "burden substantially more speech than is necessary to further the government's legitimate interests." *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989).

"Under either a free speech or equal protection theory, a content-based regulation of political speech in a public forum is valid only if it can survive strict scrutiny." *Burson*, 112 S.Ct. at 1851 n.3; *see Boos*, 485 U.S. at 321 ("the most exacting scrutiny"); *Heffron v. ISKCON*, 452 U.S. 640 (1981) (prohibitions of speech on public streets and sidewalks must be subject to strict scrutiny). Speech related to abortion is political speech and is "entitled to the fullest possible measure of constitutional expression." *Taxpayers for Vincent*, 466 U.S. at 816. "An assertion that . . . 'Abortion is Murder,' that every woman has the 'Right to Choose' . . . is just as strong as [political speech]." *Id.* "Indeed, abortion may be the political issue of the last 20 years." *Planned Parenthood Shasta-Diablo Inc. v. Williams*, 18 Cal. App. 4th 359, 375, 16 Cal. Rptr. 2d, 540, 549 (Cal. Ct. App.), *rev. granted*, 851 P.2d 744, 19 Cal. Rptr. 2d 492 (Cal. 1993). The *Cheffer* court found the Injunction did not survive strict scrutiny.[5]

In balancing the right of free speech against other individual rights this Court has held that there is a "narrow area in which the First Amendment permits freedom of expression to yield to the extent necessary for the accommodation of another constitutional right." *Burson*, 112 S.Ct. at 1859 (Kennedy, J., concurring).[6]

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[5] "A viewpoint-specific restriction in a traditional public forum is unconstitutional unless (1) it is necessary to serve a compelling state interest and (2) it is narrowly drawn to achieve that end. The state court Injunction does not seem to be either." *Cheffer*, 6 F.3d at 711 (citations omitted).

[6] Though the content-based restriction in *Burson* was upheld, that case differs from the instant case. First, the right to vote is the right of all rights, without which no other right exists. *Burson*, 112 S.Ct. at 1851; *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964) ("No right is more precious . . . . Other rights, even the most basic, are illusory if the right to vote

Traditionally, this "narrow area" is only applied in cases involving content neutral restrictions or limitations on free speech. *See Rowan v. United States Post Office Department*, 397 U.S. 728 (1970); *Ward*, 491 U.S. at 781; *Public Utilities Commission v. Pollack*, 343 U.S. 451 (1952); and *Kovacs v. Cooper*, 336 U.S. 921 (1949).

Significantly, this yielding of First Amendment rights to other competing rights becomes even narrower when confronted with restrictions on political speech and expression. The right to political expression lies at the core of the first amendment. *See Meyer v. Grant*, 486 U.S. 414, 420 (1988). A "*content-based* restriction on *political speech* in a *public forum* . . . must be subject to the most exacting scrutiny." *Boos*, 485 U.S. at 321 (emphasis in original).

Both the federal and state courts discussed the question of whether the Injunction served any asserted government interest. The Florida Supreme Court noted the government's interest in a woman's right to an abortion, public order, the free flow of traffic and protecting property. The *Cheffer* court recognized a woman's right to an abortion and noted the difficulty in weighing the value of conflicting constitutional rights. "Our sister circuit described a similar abortion protest case as a 'clash . . . between constitutional rights defined by the Supreme Court: an old one tracing its roots to the speech clause of the First Amendment and before, and a new one stemming from *Roe v. Wade*.'" *Cheffer*, 6 F.3d at 17 (quoting *Mississippi Women's Medical Clinic v. McMillan*, 866 F.2d 788, 791 (5th Cir.1989)). However, "in the instant case there is no

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is undermined") Second, the restriction was based on history to the extent that Justice Scalia found the sidewalks lost their public forum status. *Burson*, 112 S.Ct. at 1859-61. Finally, abortion "is much less explicitly protected by the Constitution than, for example, the right of free speech." *Bray v. Alexandria Women's Health Clinic*, 113 S.Ct. 753, 764 (1993). If reasonable state regulations designed to "persuade [a woman] to choose childbirth over abortion will be upheld," then individual free speech of a similar persuasion cannot be prohibited. *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 112 S.Ct. 2791, 2821 (1992).

indication in the record that women were actually prevented from obtaining abortions at the Aware Woman Center for Choice. *The clash here is between an actual prohibition of speech and a potential hindrance to the free exercise of abortion rights.*" *Cheffer*, 6 F.3d at 711 (emphasis supplied).

In specifically addressing "the First Amendment rights of protestors to advocate a right-to-life position [versus] the privacy interests of women who seek abortions while being insulated from the protestors advocacy," the Fifth Circuit Court of Appeals noted the first amendment "tilts the scale assessing threatened harm decisively in favor of the protestors." *McMillan*, 866 F.2d at 795. "The First Amendment retains a primacy in our jurisprudence because it represents the foundation of a democracy--informed public discourse." *Id.* at 796.

The other asserted interests--public safety and order, assuring the free flow of traffic and protecting property--are already well protected by other applicable laws.[7] Indeed, *Cheffer* found other state laws could easily protect those interests without infringing upon the First Amendment rights of others. 6 F.3d at 711. Statutes regulating disturbance of the peace already protect public safety and order. As for the free flow of traffic, congestion is also already protected by applicable traffic regulations. This interest can be protected by the less drastic means of enforcing laws regulating pedestrian and vehicle traffic. Other asserted public order

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[7] Fla. Stat. §§ 870.041 - 870.047 (Preservation of the public peace by local authority); Fla. Stat. § 316.130 (Pedestrian obedience to traffic control devices and traffic regulation); Fla. Stat. § 316.2045 (Obstruction of public streets, highways, and roads); Fla. Stat. § 316.2055 (Throwing advertising materials in motor vehicles); Fla. Stat. § 836.05 (Threats; extortion); Fla. Stat. § 836.10 (Written threats to kill or do bodily injury); Fla. Stat. § 838.021 (Corruption by threat against public servant); Fla. Stat. Chapter 784 (Assault; battery; culpable negligence); Fla. Stat. Chapter 806 (Arson and criminal mischief); Fla. Stat. § 837.05 (False reports to law enforcement authorities); Fla. Stat. § 784.048 (Stalking); Fla. Stat. Chapter 810 (Burglary and trespass).

interests--such as threats, assault or battery, criminal mischief and stalking--are also already prohibited by applicable law. J.A. 44. The Clinic's private property, and the associated residences, can be protected by trespass laws already in force. Truly, the Injunction does not serve to protect any interest which is not already protected and therefore is not necessary to serve any government interest. *Johnson*, 491 U.S. at 410, 412 n.8.

An injunction must be narrowly tailored to serve a compelling state interest. *See Frisby*, 487 U.S. at 482. Government "may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals." *Ward*, 491 U.S. at 799; *see also City of Houston v. Hill*, 482 U.S. 451, 464-67 (1987) (requiring that regulations on free speech be "narrow and precise").[8] As this Court noted:

> An order issued in the area of First Amendment rights must be couched in the narrowest terms that will accomplish the pin-pointed objective permitted by constitutional mandate and the essential needs of the public order. In this sensitive field, the State may not employ "means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved" . . . . In other words, the order must be tailored as precisely as possible to the exact needs of the case.

Carroll v. Presidents and Commissioners of Princess Anne, 393 U.S. 175, 183-4 (1968) (quoting *Shelton v. Tucker*, 364 U.S. 479, 488 (1960)). A regulation "is not narrowly tailored if a less restrictive alternative is readily available." *Boos*, 485 U.S. at 329; *see also Wygant v. Jacksonville Board of Education*, 476 U.S. 267, 280 n.6 (1986) (plurality opinion).

In this instance, the Injunction is not narrowly tailored to serve

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[8] Argument I. C. 1., *supra*, pp. 24-30, discusses the overbreadth. As such, the Injunction is not narrowly tailored to target the asserted interests.

the alleged government interest. The Injunction prohibits a person from standing on a public sidewalk or right-of-way while carrying a sign or wearing a shirt with a pro-life message. An individual is prohibited from distributing pro-life literature. The practical effect of the Injunction results in the total exclusion of pro-life speech. Such an outright ban is unconstitutional. *See Board of Airport Commissioners of Los Angeles v. Jews for Jesus*, 482 U.S. 569 (1987); *Frisby*, 487 U.S. at 485; *Schneider v. State*, 308 U.S. 147, 162-63 (1939).

Under the Injunction, a person wearing a "Choose Life" t-shirt near the Clinic invokes the wrath of the Injunction. A person walking within one-hundred yards of a residential area cannot carry a picket sign, discuss pro-life beliefs with another individual, or distribute pro-life literature. In essence, the person must keep silent in order to avoid prosecution. The Injunction has instituted a six and one-half acre zone of silence punishable by the wrath of the court if the silence is broken. This general prohibition against free speech within residential areas is not narrowly tailored. *See Frisby*, 487 U.S. at 2502-06; *Howard Gault Co. v. Texas Rural Legal Aid*, 848 F.2d 544 (5th Cir. 1988); *Vittitow v. City of Upper Arlington*, 830 F. Supp. 1077 (S.D. Ohio 1993); *City of Prairie Village v. Hogan*, 253 Kan. 423, 855 P.2d 949 (1993); *Town of Barrington v. Blake*, 568 A.2d 1015 (R.I. 1990).

The September 1992 permanent injunction prohibits trespassing, blocking, impeding, and physical abuse. J.A. 9. Sections (1) and (2) of the Injunction reincorporate the 1992 injunction. These provisions protect the asserted interests. However, Sections (3) through (9), relating to restrictions on expression, are not in any way related to the furtherance of these interests. "[T]he availability of alternatives such as [the September 1992 injunction and Sections (1) and (2) of the Injunction] amply demonstrates that [Sections (3) through (9) are] not crafted with sufficient precision to withstand First Amendment scrutiny." *Boos*, 485 U.S. at 329.

The Injunction is not narrowly tailored to prevent the type of

evil asserted because it broadly proscribes peaceful speech. In *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982),[9] this Court held that in the context of protected speech, courts must narrowly tailor restrictions on speech to "restrain *only unlawful conduct* and the *persons responsible for conduct* of that character." *Id.* at 924 n.67 (emphasis supplied). "Precision of regulation" is demanded when "conduct occurs in the context of constitutionally protected activity." *Id.* at 916.

The Injunction reaches beyond the thirty-six foot zone and indiscriminately prosecutes without regard to the activity's, or the person's, peaceful nature. The Injunction eviscerates Petitioners' First Amendment right to peacefully express their pro-life views and completely squelches all pro-life expression irrespective of the manner, median or means of that expression. The Injunction can in no way be construed narrowly to prohibit only unlawful conduct. As such, the Injunction violates the first amendment. *See Jews for Jesus*, 482 U.S. at 575-77.

B. The Injunction Fails The *O'Brien* And The Reasonable Time, Place, And Manner Tests.

The Injunction regulates speech and is not only content but is viewpoint-based. However, assuming, *arguendo*, that the Injunction is content neutral, it fails the *O'Brien* test and the time, place, and manner tests.

Under *United States v. O'Brien*, 391 U.S. 367 (1968), a government regulation is justified if it is (1) within the constitutional power of the government; (2) furthers an important or substantial governmental interest; (3) the interest or regulation is unrelated to the suppression of free expression; and, (4) the regulation places only an incidental restriction on free speech and is not greater than

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[9] The Florida Supreme Court specifically refused to recognize Petitioners' arguments based on *Claiborne Hardware*. The Florida Supreme Court limited *Claiborne Hardware* to the issue of damages and expressly rejected any first amendment application. Pet. App. A-24.

is essential to further that interest. *Id.* at 377. The "*O'Brien* test 'in the last analysis is little, if any, different from the standard applied to time, place, or manner restrictions.'" *Ward*, 491 U.S. at 798 (quoting *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 298 (1984)).

The Injunction fails the *O'Brien* test. First, although the state has authority to issue injunctions, the evidence does not support the Injunction against Petitioners' right to free expression, let alone those not before the court. Second, since the Injunction restrains expressive activity,[10] the *O'Brien* test is simply inapplicable. *Johnson*, 491 U.S. at 403, 406-07; *Spence v. State of Washington*, 418 U.S. 405, 414-15 n.8 (1974).

While this Court has utilized the time, place, and manner analysis on statutes, ordinances, and regulations,[11] applying this analysis to an injunction involving expression, rather than conduct, is impermissible. Such an injunction would be a prior restraint

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[10] The Injunction forbids singing, chanting, whistling, shouting, yelling, sounds, images observable, leafletting, congregating, picketing, patrolling, and demonstrating. It restricts speech that is intimidating, encouraging, or inciting. Non-threatening speech is permitted only with those who show a desire to communicate by approaching, inquiring or inviting contact. Speech must end when the listener expresses words that indicate a desire to end the contact, or words or actions of similar import. Unlike the Injunction which regulates speech, the statute in *O'Brien* dealt with "conduct having no connection with speech." *O'Brien*, 391 U.S. at 375. Activities "such as singing and chanting on public sidewalks, are protected, expressive activity." *Planned Parenthood League of Massachusetts v. Operation Rescue*, 406 Mass. 701, 714, 550 N.E.2d 1361, 1369 (1990).

[11] This Court has never applied this test to injunctive restrictions on expressive activity. *See, e.g., Cox*, 379 U.S. 559 (statute); *Frisby*, 487 U.S. at 474 (ordinance); *Community for Creative Non-Violence*, 468 U.S. at 288 (regulations).

subject to strict scrutiny.[12] However, even if the time, place, and manner analysis were appropriate for injunctions, the present Injunction fails this test. Reasonable time, place, and manner restrictions on expression are permissible only if the regulation is content neutral, narrowly tailored to serve a significant government interest, and leaves open ample alternative means of communication. *See Ward*, 491 U.S. at 798-99; *Frisby*, 487 U.S. at 481; *United States v. Grace*, 461 U.S. 171, 177 (1983); *Perry*, 460 U.S. at 45.

The Florida Supreme Court never found the state had a compelling governmental interest but rather indicated that the interests were "significant," citing a woman's freedom to seek lawful medical or counseling services, insuring public safety and order, and protecting property. Assuming these stated interests are significant, the question is whether the Injunction is a *reasonable* time, place, and manner restriction. The Florida Supreme Court reasoned that the restrictions addressed only volume, timing, location, and violent or harassing expressive activity of Operation Rescue.[13] Pet. App. A-14. The court then found that the restrictions were narrowly tailored because, unlike "generally disseminated communication that cannot be completely banned in public places, the picketing was directed at particular clinic workers and patients, not the public at large." Pet. App. A-17. The court then cited *Frisby* for the proposition that targeted picketing was prescribable. The court conceded that "while the trial court might perhaps have achieved its goal through use of a slightly narrower buffer zone around the clinic workers' residences, or by perhaps allowing a solitary picketer within the buffer zone as a symbolic gesture," the court refused to sit as a "trier-of-fact and make incremental changes in the trial court's order." Pet. App. A-18.

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[12] The injunction would also be content-based. An injunction singles out individuals and is not generally applicable like a statute. An injunction that focuses in large part on expressive activity rather than conduct limits that expressive activity precisely because of its content.

[13] As pointed out in Argument II, *infra*, pp. 44-50, Petitioners are not associated with Operation Rescue.

The Florida Supreme Court's decision is fundamentally flawed. Petitioners' expression is not solely directed at the Clinic, workers, and patients, but is directed to the public at large. The Clinic is situated on the corner of U.S. Highway 1 and Dixie Way. The Injunction goes beyond restricting mere timing, location, and violent or harassing activity. In fact, *there is no evidence of violent activity*. The trial court never made such a finding and the evidence does not support one. The flat ban on singing, chanting, images observable, and consent speech have nothing to do with the stated interests.

The state "may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals." *Simon & Schuster*, 112 S.Ct. at 511; *Ward*, 491 U.S. at 799; *Frisby*, 487 U.S. at 485. The Injunction on its face bans the distribution of literature absent "invited contact." As this Court has recognized:

> A ban on handbilling, of course, would suppress a great quantity of speech that does not cause the evil that it seeks to eliminate, whether they be fraud, crime, litter, traffic congestion or noise . . . . For that reason, a complete ban on handbilling would be substantially broader than necessary to achieve the interest justifying it.

Ward, 491 U.S. at 799 n.7 (citation omitted).

Petitioners do not shed their constitutional rights when they enter the forbidden zone. *See Tinker v. Des Moines Independent School District*, 393 U.S. 503 (1969). This right "extends to the communication of ideas by handbills and literature as well as by the spoken word." *Taxpayers for Vincent*, 466 U.S. at 810 (citing *Jamison v. Texas*, 318 U.S. 413, 416 (1943)); *see also Kovacs*, 336 U.S. at 87; *Martin v. City of Struthers*, 319 U.S. 141, 149 (1943); *Cantwell v. Connecticut*, 310 U.S. 296, 308 (1940); *Schneider*, 308 U.S. at 163. The ban on handbilling is substantially broader than any alleged interest and is not a *reasonable* time, place, and manner restriction.

Finally, the Florida Supreme Court misread this Court's decision in *Frisby*. While *Frisby* allows restrictions on targeted residential picketing, *Frisby* did not deal with a ban on general "marching through residential neighborhoods, or even walking around in front of an entire block of houses." *Frisby*, 487 U.S. at 483. By contrast, the Injunction bans picketing within three-hundred feet from all sides of the Clinic or house, an area exceeding six acres. Such ban could swallow an entire neighborhood. This restrictive ban on expressive activities does not leave open ample alternative means of communication. "Freedom of expression would not truly exist if the right could be exercised only in an area that a benevolent government has provided as a safe haven for crackpots." *Tinker*, 393 U.S. at 513. Petitioners should not have the exercise of their "liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 526, 556 (1975) (quoting *Schneider*, 308 U.S. at 163).[14] The right to speak "extends to the aggressive and disputatious as well as to the meek and acquiescent." *Martin*, 319 U.S. at 149. Unfortunately, the Injunction takes away this right and is therefore unconstitutional.

C. The Injunction Is Overbroad And Vague.

1. The Injunction is overbroad.

When free speech is at stake, "precision of drafting and clarity of purpose are essential." *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 212-13 (1975). Because of the substantial overbreadth of the Injunction, Petitioners' challenge is both as applied and on its face. *Taxpayers for Vincent*, 466 U.S. at 796.[15]

[14] *See also Taxpayers for Vincent*, 466 U.S. at 1812 (restriction on expressive activity may be invalid if "remaining modes of communication are inadequate"); *Grace*, 461 U.S. at 180-81 (existence of other streets and sidewalks is not a sufficient alternative to justify a total ban).

An overbroad regulation is subject to a facial challenge. A facial challenge is appropriate here because the Injunction "lends itself to harsh and discriminatory enforcement by local prosecuting officials against particular groups deemed to merit their displeasure" and ultimately results in a "pervasive restraint" on free expression. *Thornhill v. Alabama*, 310 U.S. 88, 97-98 (1940). The Injunction's "very existence may cause others not before the court to refrain from constitutionally protected speech or expression." *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973). Indeed, the Eleventh Circuit in *Cheffer* proves this point.[16] The overbreadth of the Injunction gave Myrna Cheffer standing to challenge the Injunction in a collateral attack.[17]

[15] *See also Saia v. New York*, 334 U.S. 558 (1948) (facial challenge permitted because of discretion given to law enforcement); *Cantwell*, 310 U.S. 296 (facial challenge permitted because of a licensing requirement without appropriate standards); *Schneider*, 308 U.S. 147 (same); *Hague v. CIO*, 307 U.S. 496 (1939) (facial challenge permitted because of uncontrolled discretion).

[16] The Eleventh Circuit recognized that "when Judge McGregor issued the Amended Permanent Injunction in the state case, he, in effect, created a criminal statute prohibiting 'pro-life' free speech activity in a certain geographical location." *Cheffer*, 6 F.3d at 708. The *Cheffer* opinion further pointed out that "Judge McGregor crafted a law that seems to apply to Cheffer, who is neither party nor an agent of any party." *Id.*

[17] Noting that standing requirements to challenge speech restrictions were less strict, the court stated that litigants "are permitted to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression." *Cheffer*, 6 F.3d at 708-09 (quoting *Virginia v. American Book Sellers Association, Inc.*, 484 U.S. 383, 392-93 (1988)) (quotations omitted); *see also Secretary of State of Maryland v. Joseph H. Munson Co.*, 467 U.S. 947, 956-57 (1984); *Broadrick*, 413 U.S. at 612.

The term **in concert** "unquestionably attaches sanctions to protected conduct." *Taxpayers for Vincent*, 466 U.S. at 799 n.19. On April 10, 1993, two days after the entry of the Injunction, approximately fifty people were arrested while peacefully present on a public sidewalk within the thirty-six foot no speech zone.[18] Those who were incarcerated on April 10 spent the weekend under arrest and appeared before Judge McGregor on April 12. Jane Doe No. 6 stated she was "just walking on the sidewalk" and "praying on the sidewalk" and stated she was "not in concert with anybody." J.A. 67, 68. Judge McGregor responded by saying there was "nothing in the Constitution that says anyone is entitled to walk on any sidewalk." J.A. 68. Mr. Quintero testified that he was on the sidewalk less than five minutes before he was arrested and he had no idea who the parties were in the Injunction, that he did not belong to any group but was "just a normal Christian that went to pray on the sidewalk." J.A. 70. To Mr. Lacy, Judge McGregor stated that the Injunction "did not pertain to those on the other side of the issue," meaning that it did not pertain to those of a pro-choice persuasion. J.A. 71. Judge McGregor also stated that when he entered the Injunction it was meant to apply only to people who were pro-life. J.A. 74. Indeed, the trial court indicated that if John Doe No. 31 could tell the prosecutor that he was pro-choice rather than pro-life, "perhaps the prosecutor would not bring the formal charge." J.A. 77.

As a result of this Injunction, by the time the City of Melbourne filed their Motion to Intervene and to Clarify on May 18, 1993, more than one-hundred pro-life persons were arrested. The City acknowledged that it interpreted "in concert" to require the arrest of any pro-life person who penetrated the thirty-six foot no speech zone, and requested advice on specific standards to determine the identity of those acting in concert or participation with those named in the Injunction. J.A. 81.

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[18] See transcript of hearing, April 12, 1993, before Judge McGregor, pages 18, 22, 24, 27, 32, 39, 42-44, 46, 49, 55, 56, 59, 74, 77, 79, 81, 83, 90, 98, 101, 103, 108, 112, 118, 121, 123, 126, 129, 131, 132, 136, 139, 147.

If the term "in concert" was used only in conjunction with Sections (1) and (2) of the Injunction, much of the overbreadth problem would be solved. Sections (1) and (2) simply reiterate the September 30, 1992, permanent injunction, and unlike Sections (3) through (9) of the Injunction, Sections (1) and (2) apply to otherwise illegal activities rather than to free expression. Blocking access into or egress from the Clinic is an objective identifiable activity, and even though not named in the Injunction, when an arresting officer viewed similar activities as restrained in Sections (1) and (2), it would be logical to assume some kind of "in concert" activity. However, Sections (3) through (9) provide the arresting officer no tangible criteria to follow because the prohibitions restrict free speech rather than activities. As a result, the Injunction lumps protected speech with unprotected activities. *See Claiborne Hardware*, 458 U.S. 886 (1982). Like the Eleventh Circuit in *Cheffer*, the Fifth Circuit Court of Appeals enjoined enforcement of a state court injunction that placed a three-hundred foot zone around white owned businesses because it prohibited all picketing in a designated business area due to intermittent violence. *Machesky v. Bizzell*, 414 F.2d 283 (5th Cir. 1969).[19] The *Machesky* court ruled that the injunction was "unconstitutionally overbroad in that it lumps the protected with the unprotected in such a way as to abridge important public interests in the full dissemination of public expression on public issues." *Id.* at 291. By "extending the injunction to 'all persons to whom notice of the injunction should

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[19] Florida Rule of Civil Procedure 1.610(c) and Federal Rule of Civil Procedure 65 state that injunctions may be binding upon "those persons in active concert or participation." While both rules may not offend first amendment liberties when applied to objective conduct such as the conduct proscribed in Sections (1) and (2) of the Injunction, when applied to non-objective speech such as is found in Sections (3) through (9), the application is unconstitutional. Having no objective standard, applying the terms "in concert or active participation with" not only violates Petitioners' right to free speech but the rights of others not before this Court. Assuming such application were constitutionally permissible, the breadth of the Injunction, as defined by Judge McGregor, violates the Constitution. *See* brief of The Rutherford Institute as *amicus curiae*.

come,' [Judge McGregor] assumed to make punishable as a contempt the conduct of persons who act independently and whose rights have not been adjudged according to the law." *Chase National Bank v. City of Norwalk*, 291 U.S. 431, 437 (1934). Subjecting non-parties "to such peril violates established principles of equity, jurisdiction and procedure." *Id.*[20]

Section (3) flatly prohibits **congregating**, **picketing**, and **patrolling** within the thirty-six foot no speech zone. This section also applies to neighboring record title property owners and their invitees, forcing neighboring property owners to censor their own invitees including their own free expression for fear of being lumped in with those acting "in concert." The Injunction impermissibly allows for "no exceptions" based on either the number of persons engaged in the proscribed activity or the peaceful character of their demeanor. *Thornhill*, 310 U.S. at 99. The "danger of breach of the peace or serious invasion of rights of property or privacy" is insufficient for prohibiting all speech in a quintessential public forum. *Id.* at 106; *Erznoznik*, 422 U.S. at 212. On its face, the Injunction prohibits a record title owner and any guests from displaying a pro-life "image" or making any pro-life "sound" which could be seen or heard in the Clinic. All property owners near the Clinic must remove all pro-life "images" from their property. The owner of private property, sitting peacefully within the home, must censor all "images" and "sounds" which might find their way into the eyes or ears of those next door. The property owner must screen all guests to insure no pro-life persons are invited who might wear an article of clothing advocating pro-life issues.

Section (4) prohibiting **sounds or images** observable or within earshot of the patients is clearly broader than necessary. Unlike *Grayned*, there is no "willful" modifier to the word "sounds."

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[20] The Injunction authorizes police officers and process servers to "serve a copy of this order on any individual who may not have otherwise received notice of the order." The Injunction further directs the City of Melbourne to erect warning signs. J.A. 61.

Grayned v. City of Rockford, 408 U.S. 104,113-14 (1972). The phrase "images observable" could literally prevent bumper stickers on parked cars, the wearing of lapel pins, or the display of a picket sign if such could be subjectively observed by someone within the Clinic. *See Burson*, 112 S.Ct. at 1862 (Stevens, J., dissenting).

Sections (5) and (6) establishing a three-hundred foot no speech zone around the Clinic and the residences of any employee, staff member, owner, or agent of the Clinic is quite troublesome. If calculated from the epicenter of the Clinic or the residence, each three hundred foot zone encompasses 6.49 acres or 282,744 square feet. Since a professional football field contains 45,000 square feet, 6.2 football fields would fit into each zone. Anyone loosely associated with the Clinic could be construed as an "agent of the Clinic." Virtually the entire City of Melbourne could be turned into a no speech zone. Because even the attorneys representing the Clinic are technically agents of the Clinic, anyone "approaching" such an agent to discuss pro-life matters is potentially subject to arrest. The "precision of regulation" demanded whenever speech is impinged is lacking. *See Claiborne Hardware*, 458 U.S. at 916-17; *NAACP v. Button*, 371 U.S. 415, 438 (1963).

The terms **intimidating** and **crowding** in Section (7) are substantially overbroad going beyond the alleged reasons for instituting the Injunction. Similarly, the term **harassing** is overbroad in Section (8). Going beyond the prevention of blocking access to or egress from the Clinic, the Injunction even prohibits **encouraging** in Section (9). Finally, the decretal portion regarding invited contact actually applies **outside of the Clinic buffer zone**, and thus outside the thirty-six and three-hundred foot zones. Consequently, even outside of the zones, a pro-life speaker risks arrests when initiating pro-life speech to someone who has not physically approached, has not extended a hand to receive literature or who has not spoken words **indicating a positive interest** in what the speaker is saying. The Injunction is substantially overbroad because it restricts speech based upon the reaction of the listener, and as this Court has recognized, a listener's "reaction to speech is not a content-neutral basis for regulation." *Forsyth County*, 112

S.Ct. at 2403; *see also Boos*, 485 U.S. at 321. The Injunction is content-based precisely because it is overbroad, and as such it is blatantly unconstitutional.[21]

The ban on handbilling is broader than necessary. *See Ward*, 109 S.Ct. at 2758 n.7. The Constitution affords Petitioners the opportunity to win the attention of the listener. *See Kovacs*, 336 U.S. at 87. City streets and sidewalks are recognized "as a normal place for the exchange of ideas by speech or paper." *Id.* Indeed, one "need not ponder the contents of a leaflet or pamphlet in order to mechanically take it out of someone's hand." *ISKCON*, 112 S.Ct. at 2713 (quoting *United States v. Kokinda*, 497 U.S. 720, 734 (1990)). Since the "distribution of literature does not require that the recipient stop in order to receive the message a speaker wishes to convey," the restriction under the Injunction is substantially broader than necessary. *ISKCON*, 112 S.Ct. at 2713-14. As this Court has recognized, the fact that a vague and overbroad restriction "lends itself to selective enforcement against unpopular causes" is enough to find it unconstitutional. *Button*, 371 U.S. at 435. In the instant case, no speculation is necessary. As applied to Petitioners, to those who have been arrested and to those not parties to the case, the Injunction clearly offends the first amendment. The Injunction is vague and overbroad and has been applied to peaceful speech having nothing to do with restricting access to the Clinic. The Injunction sends a chill up the spine when the speaker is confronted with the ominous words of the traffic sign: "WARNING. Demonstrations and picketing in this area are limited by court order. Violators of this court order are subject to arrest." J.A. 61.

2. The Injunction is vague.

An injunction is considered unconstitutionally vague if it "either forbids or requires the doing of an act in terms so vague that

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[21] See Argument I A, pp. 8-20. *See also United Food & Commercial Workers International Union v. IBP, Inc.*, 857 F.2d 422, 432 (8th Cir. 1988) (overturning ban on "persisting and talking to or communicating in any manner with" a person or persons "against his, her or their will").

[persons] of common intelligence must necessarily guess at its meaning and differ as to its application." *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926). The vagueness doctrine ensures that "all be informed as to what the state commands or forbids." *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939). The prohibition against overly vague laws protects citizens from having to voluntarily curtail their first amendment activities because of fear that those activities could be characterized as illegal. *See Grayned*, 408 U.S. at 109. "Precision of regulation" is the touchstone of the first and fourteenth amendments.[22]

Vague laws "may trap the innocent by not providing fair warning," "provide for arbitrary and discriminatory enforcement," impermissibly delegate policy matters to enforcement officials on an "*ad hoc* and subjective basis," and consequently chill free expression. *Id.* at 108-09; *see also Baggett v. Bullitt*, 377 U.S. 360, 374 (1964) ("Well-intentioned prosecutors and judicial safeguards do not neutralize the vice of a vague law"). This Court must apply strict scrutiny to the Injunction because its vagueness has an "inhibiting effect on speech." *Hynes v. Mayor & Council of Oradell*, 425 U.S. 610, 620 (1976); *see also Buckley v. Valeo*, 424 U.S. 1, 76-82 (1976); *Smith v. California*, 361 U.S. 147, 151 (1959). The following terms and sections are void for vagueness: "acting in concert," "agents," "during surgical procedures and recovery periods," "sounds or images observable to or within earshot of the patients" in Section (4); "physically approaching any person seeking the services of the Clinic," "a desire to communicate," "conversation of a non-threatening nature," and "sidewalk counseling" in Section (5); "congregating" and "patrolling" in Section (6); "intimidating" and "crowding" in Sections (7) and (8); "encouraging" in Section (9); and, the extent

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[22] *Button*, 371 U.S. at 435. Vague laws violate both free speech and due process. *Cf. Grayned*, 408 U.S. at 108-09 (noise ordinance); *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972) (loitering law); and *Coates v. City of Cincinnati*, 402 U.S. 611 (1971) (ordinance prohibiting three or more persons from assembling in an annoying manner void for vagueness).

of the prohibition outlined in the decretal portion regarding "invited contact."

The term **acting in concert** has proven problematic for law enforcement officials. Indeed, "the local police understood the Injunction to require them to arrest 'pro-life' individuals who violated the buffer zone." *Cheffer*, 6 F.3d at 707. The City of Melbourne attempted to intervene and to "clarify" the Injunction, stating that the City had arrested persons for merely entering the "buffer zone" and requested guidance "as to whether the City is required to make further determination concerning whether persons are 'acting in concert or participation' with" those named in the Injunction. J.A. 84. The City then requested the court "to advise how such determination is to be made." J.A. 84. Judge McGregor intended the term "in concert" to apply to "those who had taken a certain position in respect to the Clinic," and that it "did not pertain to those on the other side of the issue," but in fact only applied to those who were pro-life. J.A. 71. Like the loitering ordinance at issue in *Shuttlesworth v. City of Birmingham*, 382 U.S. 87 (1965) (*Shuttlesworth I*), the vagueness present in the instant Injunction allows pro-life speakers to stand on the sidewalk "only at the whim of any police officer." *Id.* at 91. Indeed, the record in the lower court indicates that those arrested for violating the Injunction were identified to law enforcement officials by Clinic employees and staff members. J.A. 75-76.

The Injunction restricts free expression around **agents** of the Clinic, yet there is no definition of "agent."[23] To determine who is an agent of the Clinic is important, because failure to recognize such an agent could result in immediate arrest for failure to obtain permission to speak.

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[23] An agency relationship "results from the manifestation of consent by one person to another that the other shall act on his behalf." Restatement (Second) of Agency § 1(1) (1984). An agency relationship can result when one asks a friend to do something and can include attorneys, brokers, auctioneers, or other similarly employed people whether employees or independent contractors. *Id.* at comments (1)(b) and (e).

Section (3) commands that crossing Dixie Way must be **prompt**. Is promptness judged by the age, disability or number of persons crossing? Are weather conditions taken in consideration, and is the determination of prompt made by the subjective observer?

Section (4) provides that **during surgical procedures and recovery periods** all pro-life persons are forbidden to sing, chant, or whistle. The term "during surgical procedures and recovery periods" is in addition to the stated time of 7:30 a.m. to noon. Those who sought the Injunction interpret the phrase to be in addition to the stated time restrictions as evidenced by a letter of April 15, 1993, requesting that the Injunction be modified by including "(as posted at the Clinic)." J.A. 79. This phrase is vague because how is one to know the times of surgical procedures and recovery periods?

The phrase **sounds or images observable to or within earshot of the patients inside the Clinic** is likewise vague. Unlike the noise ordinance at issue in *Grayned*, 408 U.S. at 106, which prohibited willful noise or diversion that intended to disturb the peace and good order of the school while in session, the prohibition on "sounds" in the Injunction contains no willful modifier and restricts sound that clearly would not disturb the activity of the clinic.[24] This requirement extends beyond the no speech zone and depends upon the subjective hearing or seeing of someone within the Clinic. Bumper stickers and lapel buttons are swept within this restriction. *See Burson*, 112 S.Ct. at 1862 (Stevens, J., dissenting).

Is the Injunction violated if an image could be, but is not actually, seen? Is the Injunction violated if a sound could be, but is not actually, within earshot? Is enforcement of the Injunction dependent upon the unique perceptive and sensory characteristics of

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[24] The noise ordinance in *Grayned* prohibited noises during class time but not before or after school. However, the noise prohibition in the Injunction applies from Monday through Saturday 7:30 a.m. to noon, and "during surgical procedures and recovery periods," resulting in movable and undefined time zones.

each individual patient? The term "earshot" is unscientific and will vary from one person to the next. Indeed, one person could claim that she heard a pro-life statement when someone else may argue that the noise was not audible. What if the clinic windows are open? Or shut? The term "earshot" is not an objective standard.

Section (5) requires prior consent before a pro-life person may **approach** any person **seeking the services of the Clinic**. Within three-hundred feet of the Clinic, a pro-life person may not distribute literature or even speak with any individual unless such person **indicates a desire to communicate**. The Injunction fails to provide an objective standard to determine if an individual three-hundred feet away from the Clinic is "seeking the services of the Clinic." Unless all persons "seeking the services of the Clinic" wear an identification badge, the pro-life speaker must guess and run the risk of incarceration if she chooses to even "approach" anyone with a pro-life message. This Court struck down as vague an ordinance restricting speech if it was annoying to those passing by. *Coates*, 402 U.S. at 612-14. Like the vague ordinance in *Coates*, the Injunction is void for vagueness because it requires parties and non-parties to subject the right of free expression and assembly "to an unascertainable standard." *Id.* at 614.

Once consent to speak is granted, pro-life speech is restricted to **conversation of a non-threatening nature**. What type of conversation is considered "non-threatening?" Who determines whether a conversation is considered "non-threatening?" The Injunction is silent on this point and leaves the pro-life speaker in a position of guessing if conversation has become threatening. The Injunction provides the person "seeking the services of the Clinic" a license to squelch speech if that person is offended. The term "non-threatening" is no less vague than the term "annoying," *Coates*, 402 U.S. at 612-14, "treats contemptuously," *Smith v. Goguen*, 415 U.S. 566 (1974), or "abusive language." *Gooding v. Wilson*, 405 U.S. 518 (1972).

The Injunction specifically restricts conversation known as **sidewalk counseling** without defining that phrase. Does the

Injunction ban all pro-life handbilling within the three-hundred foot zone? May a pro-life person pray with or discuss marital problems? May a pro-life person discuss adoption? To subject legitimate free speech rights to criminal penalty based upon a vague Injunction is reprehensible. Subjective enforcement of the Injunction by those responsible for enforcement renders the Injunction vague and unconstitutional.

Section (6) likewise prohibits **approaching** and further prohibits **congregating** and **patrolling**. The Injunction never defines these terms, and as this Court has recognized, picketing has many aspects. *See Thornhill*, 310 U.S. at 100-01 & n.18. Like the bubble zone statute ruled unconstitutional in Arizona, the Injunction does not arm the pro-life speaker "with constitutional certainty when speech will be deemed criminal." *Sabelko v. City of Phoenix*, No. 93-2229, slip op. at 25 (D.AZ Feb. 11, 1994).[25] Section (6) requires the pro-life speaker to determine, and then avoid approaching, the "residences" of those persons associated with the Clinic, while imposing arrest and incarceration for an incorrect guess. Is the three-hundred foot measurement from the physical home, or does the three-hundred foot radius extend from the edge of the property line? On any given day some pro-life person is in violation of the Injunction.

Certainly, with the many possible "agents" of the Clinic scattered about the area, some pro-life person is "approaching" within three-hundred feet of an agent's "residence." When a pro-life person seeks to relocate, she must first determine if any of the Clinic's "agents" live in the area. If so, the pro-life person is banned from moving into the neighborhood because that would be "approaching" the residence. An agent of the Clinic living in an apartment complex could silence any and all pro-life people living

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[25] The Phoenix ordinance declared that "demonstration activity" included "protesting," "picketing," and "oral protest," and was found to be vague since "the resolution of such questions will turn on the subjective and ad hoc determinations of police, judges, and juries." *Sabelko*, No. 93-2229 at 2-3.

in the complex. All those who hold a pro-life belief must immediately move or be arrested for "approaching" the residence of one of the Clinic's agents. Such a ludicrous result underscores the vagueness problem.

Section (6) further states that a pro-life speaker is forbidden from "attempting to impede, temporarily *or otherwise*, the free ingress or egress of persons to any street that provides the sole access to the street on which those residences are located." (emphasis supplied). How could a pro-life speaker possibly comply with language which criminalizes "attempting" to block any person, not just the Clinic's "employees, staff, owners or agents," from entering a street? An incorrect guess will subject a pro-life person to arrest and incarceration.

Sections (7) and (8) prohibit **intimidating** and **crowding**, but since any offensive speech could be construed as intimidating, inviting dispute, and even stirring people to anger,[26] anyone could claim intimidation and thus raise the specter of the Injunction. Indeed, "if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection." *FCC v. Pacifica Foundation*, 438 U.S. 726, 745 (1978).

Section (9) suffers from vagueness because it prohibits mere **encouragement**. However, if the first amendment means anything, it means "free trade and the opportunity to persuade, not merely to describe facts." *Thomas v. Collins*, 323 U.S. 516, 537 (1945). Finally, the decretal portion speaks about **invited contact** and actually extends beyond the thirty-six foot and three-hundred foot no speech zones. This so-called "invited contact"

> may be canceled by such person by words spoken that indicate a desire to end the contact, such as "stop," "withdraw," "back off," "get away," "leave me alone" or

[26] *See Johnson*, 491 U.S. at 408-09; *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949).

> words or actions of similar import. Where such desire to end the contact is made known to a [pro-life person], he/she must immediately terminate the contact and leave the presence of the person protected hereby.

J.A. 63.

A Phoenix bubble zone ordinance restricting pro-life speech suffered from the same fate as does the Injunction. Singling out pro-life speech to be unlawful after failing "to withdraw upon a clearly communicated request to do so," the federal district court ruled such language void for vagueness. *Sabelko*, No. 93-2229 at 26. Indeed, "what constitutes a clearly communicated request to withdraw?" *Id.* at 25. Does the phrase "I do not wish to hear from you" suffice when more realistically "the communication might be 'get lost' or 'buzz off'. What about 'shut up!'? A grunt? A push? A roll of the eyes with a mumbled swear word?" *Id.* at 25-26. "Judges and juries could easily differ on whether 'shut up' or similar communication clearly communicated a request to withdraw." *Id.* at 26.

The vagueness of the Injunction results in broad prophylactic rules and therefore is constitutionally deficient. *See Button*, 371 U.S. at 340. The Injunction requires Petitioners and those "acting in concert" to "steer far wider of the unlawful zone." *Speiser v. Randall*, 357 U.S. 513, 526 (1958). The threat of sanctions as a result of the vagueness clearly chills free expression. Rather than providing "breathing space," the Injunction suffocates speech. *Button*, 371 U.S. at 433. Faced with such vague language, rather than restrict the Injunction, the state courts expanded the Injunction, and in these circumstances, there is no reason to assume that the Injunction can or will be decisively narrowed. *Erznoznik*, 422 U.S. at 216. On its face and as applied, the Injunction is void for vagueness.

D. The Injunction Creates An Unlawful Prior Restraint.

"Temporary restraining orders and permanent injunctions--i.e.,

court orders that actually forbid speech activities--are classic examples of prior restraints." *Alexander v. United States*, 113 S.Ct. 2766, 2771 (1993). Historically, the term "prior restraint is used 'to describe administrative and judicial orders forbidding certain communications when issued in advance of the time that such communications are to occur.'" *Id.* Any prior restraint bears a "heavy presumption" against its constitutional validity. *See Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963). The state must meet a "heavy burden" to impose a prior restraint on speech. *See Nebraska Press Association v. Stuart*, 427 U.S. 539 (1976); *New York Times Co.*, 403 U.S. 713; *Vance v. Universal Amusement Co., Inc.*, 445 U.S. 308, 315-16 (1980). The presumption against prior restraints is heavier, and the degree of protection broader, than that against limits on expression imposed by criminal statutes. Society "prefers to punish the few who abuse rights of speech *after* they break the law than to throttle them and all others beforehand." *Conrad*, 420 U.S. at 559-60 (emphasis in original).

"In determining the extent of the constitutional protection, it has been generally, if not universally, considered that it is the chief purpose of the (first amendment) to prevent previous restraints upon publication." *Near v. Minnesota*, 283 U.S. 697, 713 (1931). In *Lovell*, this Court reaffirmed that "the prevention of [prior restraints] was a leading purpose in the adoption of the [first amendment]." 303 U.S. at 451.

"Prior restraint upon speech suppresses the precise freedom which the First Amendment sought to protect against abridgement." *Carroll*, 393 U.S. at 181. "The teaching of our cases is that, because only a judicial determination in an adversary proceeding insures the necessary sensitivity to freedom of expression, only a procedure requiring a judicial determination suffices to impose a valid final restraint." *Freedman v. Maryland*, 380 U.S. 51, 58 (1965); *see also Vance*, 445 U.S. at 308.

Section (3) creates a flat ban on all pro-life speech within the thirty-six foot zone. Section (4) bans sounds and images. Section (5) requires consent to speak or distribute literature. Section (6)

restrains pro-life persons from "approaching" an agent's residence. Section (9) restricts persons from "encouraging" others to act in violation of the Injunction. The decretal section prohibits all "uninvited contact."

Section (3) creates a flat ban on pro-life speech on the public sidewalk and the highway known as Dixie Way. Thus, speech is completely prohibited on the *only* public sidewalk in the vicinity. On April 10, 1993, approximately fifty persons were arrested for merely "walking" into the thirty-six foot zone. At the April 12th hearing Judge McGregor stated "there is nothing in the Constitution that says anyone is entitled to walk on any sidewalk." J.A. 68.[27] "The local police understood the Injunction to require them to arrest 'pro-life' individuals" who merely entered the thirty-six foot zone. *Cheffer*, 6 F.3d at 707. The Injunction "readily lends itself to harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure, [and] results in a continuous and pervasive restraint on all freedom of discussion that might reasonably be regarded as within its purview." *Thornhill*, 310 U.S. at 97-98.

In *Carroll*, this Court recognized a due process violation where an injunction was granted "*ex parte*, without notice to petitioners and without any effort, however informal, to invite or permit their participation in the proceedings." 393 U.S. at 180. "[T]here is no place within the area of basic freedoms guaranteed by the first amendment for [*ex parte*] orders where no showing is made that it is impossible to serve or to notify the opposing parties and to give them an opportunity to participate." *Id.* The Injunction is clearly not limited to parties before the court, but operates against all those "in concert." "Judge McGregor's Amended Permanent Injunction, by operating on persons not before this court, serves as a statute of local effect regulating picketing by anti-abortion speakers." *Cheffer*,

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[27] In addition, the Injunction bans all "sounds or images observable to or within earshot of the patients inside the Clinic." Therefore, the Injunction is not limited to the thirty-six foot zone but bans all pro-life expression anywhere near the Clinic which might be heard or seen inside.

6 F.3d at 710. None of those arrested on April 10th were parties to the proceedings, but were alleged to be acting "in concert" with those named in the Injunction. As such, the Injunction operates as an *ex parte* prior restraint on free speech.

Section (4) restricts sounds or images during surgical procedures and recovery periods. The pro-life speaker must always restrain herself from displaying an image because of the uncertainty when surgical procedures or recovery periods occur. Though this section may not be a total ban, the uncertainty operates as a total ban. "A licensing system need not affect total suppression in order to create a prior restraint." *Conrad*, 420 U.S. at 556 n.8.

Section (5) restrains speech directed toward a person seeking the services of the Clinic unless the person indicates a desire to communicate. Once speech is initiated, the pro-life speaker must always be on guard so as not to speak in a non-threatening manner. Section (6) operates as a total ban on residential picketing. Sections (7) and (8) require that speech not be intimidating. Section (9) prohibits encouraging speech. The decretal portion of the Injunction restrains speech unless "invited" as indicated by the extending of a hand to receive literature or speaking words indicating a positive interest in the subject matter. The same section also allows one associated with the Clinic to *ex parte* prohibit speech by using such words as "stop," "withdraw," "back off," "get away," "leave me alone," or words or actions of similar import. In other words, the court has empowered private citizens with injunctive authority to permanently restrain speech. For example, if a person were standing 299 feet from the Clinic discussing pro-life matters with a crowd of twenty people, and from among that crowd a person associated with the Clinic yelled "Shut up," then the pro-life speaker must end the speech or face prosecution. The threat of prosecution alone acts as a severe prior restraint. *Thornhill*, 310 U.S. at 97-98.

In *Organization For A Better Austin v. Keefe*, 402 U.S. 415, 417 (1971), this Court struck down as a prior restraint an injunction prohibiting picketing and, the "distribution of pamphlets, leaflets or literature of any kind." In *Keefe*, the injunction banned the peaceful

distribution of leaflets criticizing racial inequities in real estate transactions. Individuals distributed leaflets near the targeted business and near the home of the offending real estate agent. This Court stated that "peaceful pamphleteering is a form of communication protected by the First Amendment." *Id.* at 419; *see also Grace*, 461 U.S. at 178.

The protection against prior restraints necessarily embraces the distribution of pamphlets and leaflets, which "indeed have been historic weapons in the defense of liberty." *Lovell*, 303 U.S. at 452. "Freedom to distribute literature to every citizen wherever he desires to receive it is so clearly vital to the preservation of a free society that . . . it must be fully preserved." *Martin*, 319 U.S. at 146-47. Reaffirming that all persons have a right to receive information without prior restraint, this Court stated that "pamphlets have proven most effective instruments in the dissemination of opinion." *Id.* at 145 (quoting *Schneider*, 308 U.S. at 164).

The Injunction gives all persons "seeking the services of the Clinic" the authority to ban all pro-life speech and literature distribution within three-hundred feet of the Clinic. By requiring prior consent, the Injunction creates a prior restraint.

Possibly the most outrageous prior restraint within the Injunction is contained in the decretal section which states in relevant part:

> at all times on all days, [pro-life persons] will have the right of invited contact with persons protected hereby so long as it is outside of the Clinic buffer zone . . . . Any invited contact may be canceled by such person by words spoken that indicate a desire to end the contact, such as "stop," "withdraw," "back off," "get away," "leave me alone" or words or actions of similar import. Where such desire to end the contact is made known to a [pro-life person], he/she must immediately terminate the contact and leave the presence of the person protected hereby.

J.A. 63. This section of the Injunction is not limited to any specific location, and purports to be applied *anywhere*. The Injunction grants unfettered discretion to silence pro-life speech which is not "invited." Not only does the Injunction provide a license to silence speech, but it requires that the person, once uninvited, "leave the presence of the person protected hereby."

"[T]he fact that society may find speech offensive is not a sufficient reason for suppressing it. Indeed, if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection." *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 55 (1988) (quoting *Pacifica Foundation*, 438 U.S. at 745). On its face, the Injunction provides a license to silence objectionable speech. "If there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Johnson*, 491 U.S. at 414.

Vesting the right to suppress free speech in the discretion of private citizens creates a substantial risk of the suppression of ideas. *See Thornhill*, 310 U.S. at 88. In *Forsyth County*, this Court found that a parade permit ordinance vested excessive discretionary power in administrative officials. 112 S.Ct. at 2395; *see also Lakewood*, 486 U.S. at 750. The "invited contact" provision clearly creates a discretionary license to suppress speech. Discretionary licenses to suppress speech violate the core of the first amendment.

"It is not merely the sporadic abuse of power by the censor but the pervasive threat inherent in its very existence that constitutes the danger to freedom of discussion." *Thornhill*, 310 U.S. at 97. "[T]he success of a facial challenge on the grounds that an [Injunction] delegates overly broad discretion to the decisionmaker rests not on whether the [decisionmaker] has exercised . . . discretion in a content-based manner, but whether there is anything . . . preventing him from doing so." *Forsyth County*, 112 S.Ct. at 2403 n.10. Such "'discretion has the potential for becoming a means of suppressing a particular point of view.'" *Id.* at 2401 (quoting *Heffron*, 452 U.S. at 649).

The Florida Supreme Court erred in holding that prior restraints only apply to content-based regulations. Pet. App. A-19 and 20. State regulations need not restrict the content of speech in order to qualify as a prior restraint. Without having to reach the issue of content, this Court found a prior restraint in a regulation prohibiting the distribution of *any* kind of literature. *See Keefe*, 402 U.S. at 181. The injunction in *Carroll* was content neutral but was analyzed by this Court as a prior restraint. *See Carroll*, 393 U.S. at 181. This Court has traditionally condemned licensing schemes as prior restraints without regard to content restrictions. *See Forsyth County*, 112 S.Ct. at 2395 (parade permits); *Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969) (*Shuttlesworth II*) (public demonstration permits); *Lovell*, 303 U.S. at 444 (literature distribution permit). The Florida Supreme Court's holding is in direct conflict with the precedent of this Court.

The Injunction totally excludes peaceful pro-life handbilling within the thirty-six foot zone and creates a prior consent requirement outside the thirty-six foot zone. Like the statute at issue in *Thornhill*, the state courts below have interpreted the Injunction "so as to prohibit a single individual from walking slowly and peacefully back and forth on the public sidewalk in front of the [Clinic] without speaking to anyone, carrying a sign or placard [but] stating only the fact that [she is pro-life]." 310 U.S. at 98-99; *see* J.A. 68, 71. Such an outright ban on free speech is reprehensible and unconstitutional.

The 1992 permanent injunction adequately protects the Clinic, the patients, and the public without infringing on free expression. The 1993 Injunction violates the first amendment and this Court should find it unconstitutional. Striking the 1993 Injunction does not affect the 1992 permanent injunction, which is not challenged here, and therefore the Clinic's interests would still be protected and the right to free speech would not be violated.

II.

THE INJUNCTION VIOLATES PETITIONERS' RIGHT TO FREE ASSOCIATION.

A. The Injunction Penalizes all Persons Having A Pro-Life Viewpoint.

Like the freedom of speech, the right to free association is a fundamental right protected by the first amendment.[28] It is beyond dispute that the first amendment "protects political association as well as political expression." *Buckley v. Valeo*, 424 U.S. 1, 15 (1976). To limit "the right of association places an impermissible restraint on the right of expression." *Citizens Against Rent Control*, 454 U.S. at 300.

The right to free association "applies to the beliefs we share," and though government "may not tell a man or woman who his or her associates must be," the Injunction does just that. *Gilmore v. City of Montgomery*, 417 U.S. 566, 575 (1974); *see also NAACP v. Button*, 371 U.S. 415, 444-45 (1963). The Injunction penalizes anyone with a pro-life viewpoint on two fronts. First, Petitioners Madsen, Martin, and Hobbs are lumped in with other alleged actors and certain named, yet nondescript organizations,[29] solely because they hold a pro-life belief. The Injunction cites a parade of horribles allegedly performed by unknown actors, Bruce Cadle, and a group called Operation Rescue. The only affiliation Petitioners share is their pro-life belief. Respondents specifically stipulated on

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[28] *See, e.g., Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984); *Citizens Against Rent Control v. Berkeley*, 454 U.S. 290, 300 (1981); *Healy v. James*, 408 U.S. 169, 181 (1972); *Brandenburg v. Ohio*, 395 U.S. 444, 449 n.4 (1969); *Bates v. City of Little Rock*, 361 U.S. 516, 522 (1960); *Thomas v. Collins*, 323 U.S. 516, 530 (1945); *De Jonge v. Oregon*, 299 U.S. 353, 364 (1937).

[29] The trial court was confused as to the identities of the organizations. J.A. 378-385.

July 30, 1992, that "Ed Martin, Judy Madsen and Shirley Hobbs have not actually, physically blocked access to the abortion clinics located in Brevard or Seminole County."[30] Though it is a stipulated fact that Petitioners never blocked access to the Clinic, and there is no evidence that they orchestrated others to do so, and further that there is no evidence that they are associated with Bruce Cadle or Operation Rescue, they have had their free speech and association rights stripped from them.

Second, the Injunction violates freedom of association through the term "in concert." As noted in other parts of this brief, the term "in concert" was intended to sweep within its ambit everyone who has a pro-life viewpoint. The Injunction simply "did not pertain to those on the other side of the issue" but instead applies to only to those who "seem to be supportive of pro-life." J.A. 72.

Membership, holding beliefs shared by a violent or illegal group, the mere advocacy or moral necessity for resort to force or violence without preparing a group for violent action, or undifferentiated fear is not sufficient to throttle speech and association.[31] The record reveals no evidence of violent activity. Though some might be discomforted by pro-life speech, such

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[30] Counsel for the Clinic frequently told the trial court that the purpose of the hearing to amend the 1992 permanent injunction had nothing to do with Petitioners Madsen, Martin, and Hobbs. J.A. 307, 331, 343, 348, 372, 374, and 375 ("I've already said that Judy Madsen is not a target of these contempt proceedings").

[31] *See Healy*, 408 U.S. at 185; *Brandenburg*, 395 U.S. at 448-49; *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969); *United Mine Workers of America v. Gibbs*, 383 U.S. 715 (1966); *Noto v. United States*, 367 U.S. 290 (1961); *Scales v. United States*, 367 U.S. 203, 225, 229 (1961); *Yates v. United States*, 354 U.S. 298 (1957); *Whitney v. California*, 274 U.S. 357, 376 (1927).

discomfort, is not sufficient to sustain the Injunction.[32]

The government has the burden of proving Petitioners knowing affiliation with a group possessing unlawful aims and goals, and a specific intent to further those illegal aims. The evidence below does not support this burden. *See Healy*, 408 U.S. at 186. Rather, Petitioners and those "in concert" are assumed guilty by association. *See United States v. Robel*, 389 U.S. 258 (1967). However, "peaceful assembly for lawful discussion cannot be made a crime." *De Jonge*, 299 U.S. at 365.

In *Healy* a student organization was denied official campus recognition because of a possible affiliation with the National Students for a Democratic Society. This national organization advocated violence, and violent activity had followed them on other university campuses. This Court found the university's action unconstitutional, noting that the government "may not restrict speech or association simply because it finds the views expressed by any group to be abhorrent," nor may the state restrict association because of undifferentiated fear or apprehension of disturbance. *Healy*, 408 U.S. at 188, 191.[33] Free association may not be

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[32] This Court upheld an injunction arising out of a labor dispute in *Milk Wagon Drivers Union of Chicago, Local 753 v. Meadowmoor Dairies*, 312 U.S. 287 (1941). However, *Milk Wagon* clearly involved extreme and repeated acts of violence including a pattern of violence "which would inevitably reappear in the event picketing were later resumed." *Youngdahl v. Rainfair, Inc.*, 355 U.S. 131, 139 (1957). Moreover, *Milk Wagon* is specifically limited to its facts. 312 U.S. at 298-99; *Gibbs*, 383 U.S. at 731-32. Finally, *Milk Wagon* acknowledged that the injunction was for a temporary period lasting only as long as the extreme violence.

[33] Justice Black was right on point when he stated, "I do not believe that it can be too often repeated that the freedoms of speech, press, petition, and assembly guaranteed by the First Amendment must be accorded to the ideas we hate or sooner or later they will be denied the ideas we cherish." *Communist Party v. Subversive Activities Control Board*, 367 U.S. 1, 137 (1961) (Black, J., dissenting).

denied "merely because an individual belongs to a group, some members of which committed acts of violence." *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 920 (1982). The trial court and the Florida Supreme Court ignored this Court's admonition that there must be an "evidentiary basis for concluding that specific parties agreed to use unlawful means, that carefully identify the impact of such unlawful conduct, and that recognize the importance of avoiding the imposition of punishment for constitutionally protected activity." *Id.* at 933. Expression regarding issues of public concern "has always rested on the highest rung of the hierarchy of First Amendment values." *Id.* at 913 (quoting *Carey v. Brown*, 447 U.S. 455, 467 (1980)). However, "the Injunction appears to 'criminalize' various acts of peaceful protest, including the mere penetration of the buffer zone." *Cheffer v. McGregor*, 6 F.3d 705, 707 (11th Cir. 1993).[34] As such, the Injunction penalizes anyone with a pro-life viewpoint. This Court has recognized that

> if the rights of free speech and peaceable assembly are to be preserved [the question is] not as to the relations of the speakers, but whether their utterances transcend the bounds of the freedom of speech which the Constitution protects. If the persons assembling have committed crimes elsewhere, if they have formed or engaged in a conspiracy against the public peace and order, they may be prosecuted for the conspiracy or other violation of valid laws. But it is a different matter when the State, instead of prosecuting them for such offenses, seizes upon mere participation in a peaceable assembly and a lawful public discussion as the basis for a criminal charge.

De Jonge, 299 U.S. at 365.

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[34] The *Cheffer* court assumed Judge McGregor had the authority to craft a civil injunction with criminal penalties. 6 F.3d at 708, n.4. Under Florida law he had such authority to enforce a civil injunction with criminal contempt. *See* Fla. Stat. § 60.06; *Demetree v. State*, 89 So. 2d 498 (Fla. 1956).

B. The Injunction Eradicates Group Advocacy.

The Florida Supreme Court made the same fatal mistake as the trial court entering the Injunction--lumping Petitioners together with other named and unnamed individuals, and because of the alleged actions of these other individuals, restricting Petitioners' right to speech and association solely because all share a pro-life view. On its face, and as applied, the Injunction lumps together any individual with a pro-life views through the term "in concert." Since the "practice of persons sharing common views banding together to achieve a common end is deeply embedded in the American political process," any restriction on group advocacy should meet with strict scrutiny. *Citizens Against Rent Control*, 454 U.S. at 294. Though there is no evidence that Petitioner Madsen ever visited the Clinic, evidence that Petitioner Martin had not been there in two to two and a half years,[35] and no evidence that Petitioner Hobbs was disruptive, Petitioners' right to associate with other pro-life individuals has been flatly prohibited. Moreover, anyone who associates with Petitioners will be construed as acting "in concert" with them, and Petitioners have therefore lost their right to associate with others. The Injunction consequently isolates Petitioners and imposes liability on them even though there is no evidence they incited or produced any imminent lawless action. *See Brandenburg*, 395 U.S. at 447.

The right to free speech protects the marketplace for "the clash of different views and conflicting ideas," and oftentimes this "clash" can only be achieved when individuals collectively combine to make known their views because individually their "voices would be faint or lost." *Citizens for Rent Control*, 454 U.S. at 294-95. While there may be some activities "legal if engaged in by one, yet illegal if performed in concert with others, . . . political expression is not one of them." *Id.* at 296. The reason the first amendment protects free association is because effective advocacy, particularly on

[35] Dr. Snydle testified that he saw Martin at the Clinic. J.A. 193, 211. Martin and Cadle both testified that Martin had not been at the Clinic in more than two years. J.A. 378, 427.

"controversial" issues, is "undeniably enhanced by group association." *NAACP v. Alabama ex rel Patterson*, 357 U.S. 449, 460 (1958).

This Court has stated that "[t]he right to associate does not lose all constitutional protection merely because some members of the group may have participated in conduct or advocated doctrine that itself is not protected." *Claiborne Hardware*, 458 U.S. at 908. This Court has also stated that a "'blanket prohibition of association with a group having both legal and illegal aims' would present 'a real danger that legitimate political expression or association would be impaired.'" *Scales*, 367 U.S. at 229.

Respondents assert that Petitioners' speech should not be protected because it creates "fear and intimidation" among Clinic patients and personnel. However, the first amendment clearly protects group association to protest practices that segments of the public find reprehensible. *See Thornhill*, 310 U.S. at 99 (picketing intended to "induce the customers not to patronize the employer"). Moreover, as this Court noted in *Claiborne Hardware*, "[s]peech does not lose its protected character . . . simply because it may embarrass others or coerce them into action." 458 U.S. at 910.

Denying Petitioners the right to freely associate and express their views simply because of their commonly held pro-life belief eviscerates their First Amendment rights. Limiting Petitioners' right to free speech and association merely by virtue of shared beliefs abolishes the very core of first amendment protections. It is impermissible to impute the misconduct of some to Petitioners and others of similar belief.

The 1992 permanent injunction appropriately protects the Clinic, the patients, and the public without violating the right to free association. The 1993 Injunction violates free association and therefore should be stricken as unconstitutional. Finding the 1993 Injunction violative of the first amendment stills leaves in effect the 1992 permanent injunction which appropriately protects the Clinic without infringing on free association.

CONCLUSION

In light of the above, this Court should reverse the judgment of the Florida Supreme Court.

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In the Supreme Court of the United States

OCTOBER TERM, 1993

JUDY MADSEN, ET AL., PETITIONERS

v.

WOMEN'S HEALTH CENTER, INC., ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

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QUESTIONS PRESENTED

The United States will address the following question:

Whether the injunction provisions challenged by petitioners are consistent with the First Amendment.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

INTEREST OF THE UNITED STATES

This case arises out of an action brought in Florida state court by respondent medical clinics, which provide abortion-related services to patients. A Florida trial court issued an injunction against petitioners and others who had engaged in and threatened to engage in wrongs to the clinics, including impeding clinic patients and employees from entering the clinic, and intimidating and harassing patients and employees at a clinic and at their residences. The Florida Supreme Court upheld the validity of the injunction. Petitioners challenge certain provisions of the injunction as violations of their First Amendment rights of freedom of speech and association.

The United States has an important interest in seeing that adequate judicial relief is available against those who

illegally impede access to medical clinics providing abortion-related services. Legislation is currently pending in Congress that prohibits the intimidation of, or interference with, any person obtaining or providing abortion-related services. See H.R. 796, S. 636, 703d Cong., 1st Sess. (1993) (The Freedom of Access to Clinic Entrances Act of 1993). If enacted, the legislation will authorize the Attorney General to bring criminal charges for violations of the law, as well as to seek injunctive relief. The constitutional analysis that is applied by the Court in resolving this case may have a direct bearing on the validity and interpretation of that legislation.

The United States also has an important interest in preserving the ability of its citizens to exercise their First Amendment rights in a manner compatible with the rights of others.

STATEMENT

1. Respondents own and operate medical clinics in Brevard and Seminole counties, Florida and other parts of central Florida that provide abortion services and birth control counselling to women. J.A. 6. In October, 1991, respondents filed suit in Florida state court against petitioners Judy Madsen, Ed Martin and Shirley Hobbs, as well as others including Operation Rescue, Operation Rescue America, Operation Goliath, Bruce Cadle, Pat Mahoney, and Randall Terry. Respondents sought an injunction preventing these defendants[1] from engaging in announced plans to block access to respondents' clinics.

On October 25, 1991, the Circuit Court in and for Seminole County granted a temporary restraining order against defendants, and all persons acting in concert with

[1] The persons against whom relief was sought were referred to in the state trial court proceedings as "respondents." We use the term "defendants" to avoid confusion with the respondents in this Court (who were the plaintiffs in the trial court). We use "petitioners" to refer to the three defendants who are now petitioners in this Court.

them. Prior to ruling on the request for permanent injunctive relief, the court required the parties to submit a stipulation of issues and facts. Petitioners stipulated that they are "active in an organization known as 'Operation Rescue America'" and "are members of Operation Rescue America." Pet. App. A2 n.2, R. 64-65. Petitioners further stipulated that their "desire is to close down 'abortion mills' by various means," that they understood that "peacefully blocking access to the facilities might constitute a trespass that is punishable by criminal penalties," and that they felt 'a violation of such a criminal statute is justified by their belief that protection of the unborn may merit breaking the criminal trespass laws.' R. 65. The stipulation also provided that petitioners had not at that time physically blocked access to abortion clinics in Brevard or Seminole counties. *Ibid.*

On September 30, 1992, the court entered a permanent injunction supported by findings of fact. J.A. 5-10. The court found that the defendants were "individuals and organizations, acting in concert" who were engaged in a nationwide campaign directed towards closing down abortion clinics and providers by blocking access to clinics, Pet. App. A3 n.3, J.A. 6, that petitioners were members of Operation Rescue and Operation Rescue America, *ibid*; that Rescue America literature states that "their members should ignore the law of the State and the police officers who remove them from blockading positions," J.A. 7; that the defendants had wrongfully interfered and intended to continue wrongfully to interfere with respondents' property interests and business relationships, J.A. 7-8; that the defendants also had sought to interfere with the right of choice of respondents' patients, and the right to work of respondents' employees, rights guaranteed by the Florida constitution, J.A. 8; and that respondents, their patients and employees had no adequate remedy at law and would suffer irreparable

injury if the defendants were not enjoined from blocking or interfering with access to respondents' clinics, J.A. 7.

The court determined that the defendants' threatened actions provided a proper basis for injunctive relief under state law because the applicable criminal statutes would not adequately address the injuries that respondents would suffer if the defendants were not restrained. J.A. 8-9. The court therefore enjoined the defendants from: "(1) trespassing on, sitting in, blocking, impeding or obstructing ingress into or egress from any facility at which abortions are performed in Brevard and Seminole County, Florida; (2) physically abusing persons entering, leaving, working or using any services of any facility at which abortions are performed in Brevard and Seminole County, Florida; and (3) attempting or directing others to take any of the actions described in Paragraphs 1 and 2 above." J.A. 9. The court specified that nothing in the injunction should be construed to limit the defendants' exercise of their legitimate First Amendment rights in a manner that did not violate the three quoted paragraphs. *Ibid.*

2. In March, 1993, respondents filed emergency motions for sanctions against defendants for violation of the injunction and for modification of the injunction with respect to the Aware Woman Clinic in the city of Melbourne, Brevard County, Florida (the clinic).

After a three-day evidentiary hearing, the court concluded that, despite the injunction, "there ha[d] been interference with [the] ingress to" the clinic, including interference by some persons on the paved street, some persons approaching and trying to communicate with persons in moving cars, and some persons marching in a manner that crossed the entrance driveways into the clinic parking lots. J.A. 50-51. The court found that this conduct resulted in congestion, slowed down traffic, and that traffic attempting to enter the clinic either had to slow further or stop until persons in the driveway moved out of the way. J.A. 51. The court further found that

persons designated by defendants as "sidewalk counselors" approached cars while they were forced to hesitate or stop and attempted to get the attention of the occupants to give them literature and to urge them not to go to the clinic. J.A. 52-53. Demonstrators were seen running along side of and in front of patients' cars and pushing pamphlets through car windows to persons who had not indicated any interest in the literature. *Ibid.* Some patients turned away from the crowd in the driveway and did not enter. J.A. 54. Persons would occasionally place a ladder on the outside of the clinic's west and north fences to position themselves above the fence and attempt to shout at staff and patients entering the clinic, including on one occasion shouting to a staff person, "I pray that God strikes you dead now!" J.A. 53.

With regard to the effect of defendants' conduct on patients, the court found that "[a]s a result of patients having to run such a gauntlet, the patients manifested a higher level of anxiety and hypertension causing those patients to need a higher level of sedation to undergo the surgical procedures, thereby increasing the risk associated with such procedures." J.A. 54. "[T]he noise of singing, chanting, shouting and yelling could be heard through the walls of the clinic and caused stress in the patients during surgical procedures and while recuperating in the recovery rooms." *Ibid.* Delay in undergoing the medical procedures (which occurred when patients were turned away because of the crowd in the driveway or arrived too anxious to be treated, J.A. 149-153, 154, 590), increased the risk associated with those procedures. J.A. 54.

On other occasions after the entry of the original injunction, a defendant and others acting in concert with him, approached the private homes of clinic staff and directly communicated with persons at those homes, including minor children who were alone. They carried signs, walked up and down the sidewalk or street in front of the residences, shouted at passers-by, rang doorbells of

neighbors, and provided literature identifying the employees as "baby killer[s]." J.A. 53. On one occasion, a defendant and others demonstrated at a motel where a staff physician was staying. Some of the others entered the lobby yelling "child murderer" and "baby killer" and prevented the physician from leaving for the clinic until after the demonstration. J.A. 53-54. On another occasion, the physician was followed by a person associated with the defendants who "communicated his anger to the doctor by pretending to shoot him from the adjoining vehicle." J.A. 54. As a result of the foregoing, and after a physician was killed at a clinic in north Florida, the physician quit his employment at respondent's clinic. J.A. 54-55.

The court found that defendants and persons acting in concert with them had recorded patients' license plate numbers and used them to obtain the patients' home addresses, where they contacted them. The court found that "patients and staff are sometimes followed in a stalking manner when they leave the clinic, giving such persons a feeling of great apprehension." J.A. 55.

Based on these and other detailed findings, the court concluded that the actions of defendants and those acting in concert with them in the street and driveway continued to impede and obstruct staff and patients from entering the clinic. The court further concluded that the noise associated with the demonstrations impermissibly interfered with the operation of the clinic and the well-being of the patients. J.A. 55. Finally the court concluded that the actions of defendants and those acting in concert with them directed at the clinic employees' residences, and "the uninvited contacts, shadowing and stalking" of clinic staff and patients by defendants and those acting in concert with them were also impermissible conduct and should be restrained. J.A. 56. At the same time the rights of defendants "to demonstrate, speak and make known their views should be recognized and protected." *Ibid.*

Accordingly, on April 8, 1993, the court issued an amended permanent injunction addressed to defendants "and all persons acting in concert or participation with them, or on their behalf, with notice in any manner or by means of this order." J.A. 56-57. The injunction prohibits them from entering, congregating, demonstrating or engaging in other specified conduct within 36 feet of the clinic, J.A. 57-58 (the 36-foot clinic buffer zone); from physically approaching persons seeking clinic services within 300 feet of the clinic unless invited to do so, J.A. 59 (the 300-foot clinic buffer zone); from approaching or congregating within 300 feet of the residences of clinic employees, J.A. 59-60 (the 300-foot residential buffer zone); and from engaging in certain other specified conduct such as assaulting or threatening clinic patients or employees.[2]

Petitioners appealed the entry of the amended injunction to an intermediate appellate court in Florida, which certified the case to the Supreme Court of Florida. J.A. 89.

3. The Florida Supreme Court affirmed. Pet. App. A1-A25. The court concluded that the challenged restrictions are content-neutral, and that numerous significant government interests are served by the injunction, including protection of the state and federal constitutional rights of citizens to seek lawful medical and counseling services in connection with pregnancy, ensuring public safety and order, promotion of the free flow of traffic on public streets and sidewalks, protection of property rights of all Florida's citizens, and protection of residential privacy and ensuring medical privacy. *Id.* at A15-A16.

The court also found that the injunction restrictions are narrowly tailored, that ample alternative channels of communication are left open because the defendants can at all times engage in expressive activity in the vicinity of the clinic, and that the doctrine of prior restraint did not

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[2] The complete injunction is set forth at J.A. 50-65, and includes a map of the relevant area.

apply because the injunction was not content-based. Pet. App. A19-A20. The court rejected a vagueness challenge to various aspects of the injunction, reasoning that the language was sufficiently specific to provide reasonable notice and was fashioned to combat specific past abuses. *Id.* at A21-A22. The court rejected an overbreadth challenge noting that the injunction is narrowly tailored and that its language applying to those acting in concert with defendants tracks the language of Fla. R. Civ. P. 1.160(c). The court did not find a danger that the ban would be unfairly enforced against anyone not having notice or knowledge of the injunction. Pet. App. A22. The court noted that its holding "is consistent with the vast weight of both federal and state caselaw, wherein courts have upheld virtually all the present restrictions under similar circumstances." *Id.* at A24.[3]

SUMMARY OF ARGUMENT

The Florida trial court's injunction contains reasonable time, place and manner restrictions that are narrowly tailored to serve significant government interests and that leave ample alternative channels open for petitioners to communicate their message. The buffer zones created by the injunction are not content-based restrictions on free speech and association. The injunction was framed in response to illegal *conduct*, rather than speech, and it does not ban any particular message but only limits the manner in which speech can be conveyed in certain places. Nor do the buffer zones constitute prior restraints. The injunction is designed to preclude continuation of unlawful

[3] The Florida Supreme Court also noted that a panel of the Eleventh Circuit had "recently ruled that the federal district court had erred in denying an abortion opponent's request for relief from the * * * injunction" in this case. See Pet. App. A25. In a dissenting opinion, Judge Paine (Senior District Judge, sitting by designation), pointed out that the majority opinion omitted the factual background of the injunction and disagreed with the majority's analysis of the plaintiff's standing. *Cheffer* v. *McGregor*, 6 F.3d 705, 712-715 (1993).

activity which the trial court found was committed by the named defendants and persons acting in concert with them. It is tailored to ensuring that those persons can still communicate their message, but in a manner consistent with unimpeded access to medical services at the clinic and the health and safety of persons seeking and providing abortion-related services.

The fact that the injunction applies to persons acting in concert with the named defendants does not violate the constitutional guarantee of free association. Enjoining persons acting in concert with the defendants was a reasonable exercise of judicial authority designed to ensure that the purpose of the injunction was not evaded. Nor does the injunction suffer from unconstitutional vagueness or overbreadth.

ARGUMENT

I. THE STATE COURT'S INJUNCTION IS A CONDUCT-BASED, RATHER THAN A CONTENT-BASED, REGULATION

Petitioners' principal challenge to the Florida trial court's injunction is that it is a content-based regulation of expressive activity. That contention is mistaken. The injunction in this case is not based on either the content of speech or viewpoints espoused, but on conduct violating the rights of the clinic, its patients, staff, and the public.

It is important to note that the trial court did not enjoin petitioners or other defendants from using any particular language or communicating any particular message—the injunction does not in any way restrict *what* defendants may say. As the Florida Supreme Court correctly explained:

> The restrictions regulate when, where, and how Operation Rescue[4] may speak, not what it may say.

[4] The Florida Supreme Court referred to petitioners and the other defendants collectively as Operation Rescue.

> The restrictions make no mention whatsoever of abortion or any other political or social issue; they address only the volume, timing, location and violent or harassing nature of Operation Rescue's expressive activity.

Pet. App. A14.

Nor was the injunction in this case issued because of defendants' views or the content of their expressive activity. It was issued because defendants had repeatedly interfered with the rights of others after having once been enjoined from doing so. Thus, after a three-day evidentiary hearing, the trial judge specifically found that the actions of defendants and those acting in concert with them had "impede[d] and obstruct[ed] both staff and patients from entering the clinic," that the noise associated with their demonstrations "interfere[d] with the operation of the clinic and the well-being of its patients," that their targeting of the residences of clinic staff interfered with the right of privacy of those staff members, and that they had engaged in "shadowing and stalking" of clinic patients and staff. J.A. 55-56.

The portions of the injunction challenged by petitioners are based directly on these factual findings of unlawful conduct.[5] The 36-foot buffer zone in which all congregating is prohibited is supported by the demonstrated need to offer protection against physical obstruction of access to the clinic; the 300-foot buffer zone in which uninvited contacts with clinic patients are prohibited is supported by the trial court's conclusion that such contacts, including "shadowing and stalking," were intimidating to patients; the prohibition on noisy demonstrations during the hours of surgical procedures and recovery periods is supported by the need to protect the medical welfare of patients; and the 300-foot buffer zone around the residences of clinic

[5] The conduct specified by the trial court is unlawful under Florida law. See Pet. Br. 17 & n.7.

staff is supported by the trial court's conclusion that rights of privacy had been repeatedly violated. Each of these provisions, it is clear, is justified by petitioners' prior illegal conduct, "without reference to the content of the regulated speech." *Boos* v. *Barry*, 485 U.S. 312, 320 (1988); *Ward* v. *Rock Against Racism*, 491 U.S. 781, 791 (1989).[6]

Neither the fact that the injunction in this case was issued in response to anti-abortion protests nor the fact that it applies only to persons acting in concert with defendants transforms the injunction into a content-based prohibition. In *Frisby* v. *Schultz*, 487 U.S. 474 (1988), for example, the Court treated a city ordinance banning residential picketing as content-neutral despite recognition of the fact that the ordinance was enacted in response to anti-abortion picketing. *Id.* at 476-477. And application of the injunction in this case to persons acting in concert with the named defendants responds, not to an association of viewpoints or opinion, but to the factual finding that the defendants and persons acting in concert with them had unlawfully interfered with the clinic's business relations, with the right of the clinics' employees to work, and with the right of choice of the clinics' patients.[7]

[6] To the extent that various instances of conduct against clinic patients and employees constituted physical assaults, such conduct "is not by any stretch of the imagination expressive conduct protected by the First Amendment." *Wisconsin* v. *Mitchell*, 113 S. Ct. 2194, 2199 (1993). Similarly, "violence and other types of potentially expressive activities that produce special harms distinct from their communicative impact," such as threats, "are entitled to no constitutional protection." *Roberts* v. *United States Jaycees*, 468 U.S. 609, 628 (1984); see *R.A.V.* v. *St. Paul*, 112 S. Ct. 2538 (1992); *Watts* v. *United States*, 394 U.S. 705, 707 (1969).

[7] Petitioners claim that the injunction is content-based because of the trial judge's statements to certain protestors who were arrested shortly after its issuance. See Pet. Br. 10-13, 26-27. The judge's remarks, however, merely confirm what is evident from the face of the injunction: whether a person violates the injunction depends on whether that person is a named defendant or someone acting in concert

The injunction does not in any way prohibit expressions of views that agree with or support petitioners; persons holding such views are free to express them at any time or in any place so long as they do not act in concert with defendants in interfering with the clinic, its patients or its staff. Nor have petitioners shown, or even suggested, that the state of Florida would not afford similar injunctive relief to any other business that found its entrance repeatedly blocked by demonstrators, or that similar injunctive relief could not be obtained in other situations where demonstrations interfere with the exercise of constitutional rights.[8]

II. THE BUFFER ZONES ARE REASONABLE TIME PLACE AND MANNER RESTRICTIONS THAT SERVE SIGNIFICANT GOVERNMENT INTERESTS, THAT ARE NARROWLY TAILORED TO THOSE INTERESTS, AND THAT LEAVE OPEN AMPLE ALTERNATIVE CHANNELS FOR COMMUNICATION

This Court has long recognized that "the First Amendment reflects a 'profound national commitment' to the principle that 'debate on public issues should be uninhibited, robust, and wide-open.'" *Boos* v. *Barry*, 485 U.S. 312, 318 (1988) (opinion of O'Connor, J.), quoting *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 270 (1964). The right of free speech, however, is not unlimited:

> [T]he First Amendment does not guarantee the right to communicate one's views at all times and places or in any manner that may be desired. * * * [Activities] protected by the First Amendment, are subject to *reasonable time, place, and manner restrictions.*

Heffron v. *International Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 647 (1981) (emphasis added). "Even protected speech is not equally permissible in all places and at all times." *Cornelius* v. *NAACP Legal Defense & Ed. Fund*, 473 U.S. 788, 799 (1985). Where a case, like this one, involves a traditional public forum such as sidewalks and streets, the state may therefore "enforce regulations of the time, place and manner of expression which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication." *Perry Educ. Ass'n* v. *Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983); see also *Poulos* v. *New Hampshire*, 345 U.S. 395, 405 (1953) (indicating approval "of reasonable nondiscriminatory regulation by governmental authority that preserves peace, order and tranquility without deprivation of the First Amendment guarantees of free speech, press, and the exercise of religion"). These principles apply as well where courts seek to use their equitable powers to preserve public order or private rights. See *Hirsh* v. *City of Atlanta*, 495 U.S. 927, 927 (1990) (Stevens, J., concurring in denial of stay) (referencing "injunctive relief imposing time, place, and manner restrictions upon a class of persons who have persistently and repeatedly engaged in unlawful conduct").

Indeed, in some respects, the powers of a court imposing injunctive relief in specific cases upon findings that unlawful conduct has occurred and is likely to be repeated unless enjoined, may be broader than legislative powers that are not based on such findings. See *United States* v. *Paradise*, 480 U.S. 149 (1987) (upholding remedial injunction that employed a racial classification which would not be lawful in a legislative enactment); *Hirsh*, *supra* (distinguishing time, place and manner injunction against proven wrongdoers from "naked prior restraint" injunction against

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with a named defendant, not on the content of that person's speech. See J.A. 66-77.

[8] In addition to their challenge to the buffer zones, petitioners contend that the prohibition against their displaying images observable to patients in the clinic during surgical procedures and recovery periods is content-based, Pet. Br. 5, 11-12. That prohibition, however, like all of the other aspects of the injunction, does not depend in any manner on the content of the images.

marchers without history of illegal conduct). When defendants have violated the law, injunctive relief may "go[] beyond a simple proscription against the precise conduct previously pursued," even if the resulting order "may curtail the exercise of [First Amendment] liberties that the [defendant] may otherwise enjoy." *National Soc'y of Prof. Eng'rs* v. *United States*, 435 U.S. 679, 697, 698 (1978); *Chicago Teachers Union* v. *Hudson*, 475 U.S. 292, 309 n.22. (1986) ("the judicial remedy for a proven violation of law will often include commands that the law does not impose on the community at large"); *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15-16 (1971); *Milk Wagon Drivers Union* v. *Meadowmoor Dairies, Inc.*, 312 U.S. 287, 292 (1941).[9]

In the instant case the trial court carefully crafted an injunction designed to address specific actions by the defendants and persons acting in concert with them that it had found to be unlawful. These actions included unlawful interference with respondents' business relations, unlawful interference with the clinic patients' right of access to medical services, interference with clinic employees' state constitutional right to work, interference with rights of privacy, and stalking and threatening of clinic patients and employees. The court further found that these repeated illegalities were such that respondents and others would suffer irreparable harm if defendants were not enjoined. State criminal remedies were specifically determined not to provide adequate relief to respondents in these circumstances. It is also notable that the restrictions challenged

[9] Petitioners' reliance on *NAACP* v. *Claiborne Hardware Co.*, 458 U.S. 886 (1982) (see Pet. Br. 20) is misplaced. The validity of the injunction was not before the Court in that case. That injunction was, moreover, extremely broad and in effect prohibited all picketing and boycott activity. The Court expressly stated that it was not presented with, and did not need to decide, "the extent to which a narrowly tailored statute designed to prohibit certain forms of anticompetitive conduct or certain types of secondary pressure may restrict protected First Amendment activity." 458 U.S. at 915, n.49.

by petitioners were imposed only after the state court had first attempted to remedy the situation by less restrictive relief; defendants' own actions in violating that injunction necessitated further restrictions by the court. The Florida Supreme Court explained:

> While the First Amendment confers on each citizen a powerful right to express oneself, it gives the picketer no boon to jeopardize the health, safety, and rights of others. No citizen has a right to insert a foot in the hospital or clinic door and insist on being heard—while purposefully blocking the door to those in genuine need of medical services. No picketer can force speech into the captive ear of the unwilling and disabled.

Pet. App. A24.

In our view, the Florida Supreme Court correctly determined that the content-neutral injunction in this case satisfies the constitutional requirement that it be "narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication." *Perry Educ. Ass'n*, 460 U.S. at 45.

A. Significant Government Interests Are at Stake

The Florida Supreme Court clearly identified the important governmental interests directly served by the injunction in this case. Most significantly, the state undoubtedly has a substantial interest in protecting the exercise of state and federal constitutional rights, including a woman's right to seek medical services in connection with pregnancy, a right protected by both the federal and Florida constitutions. *Roe* v. *Wade*, 410 U.S. 113 (1973); *In re T.W.*, 551 So.2d 1186 (Fla. 1989); cf. *Burson* v. *Freeman*, 112 S. Ct. 1846 (1992) (state can prevent campaigning within 100 feet of a polling place, to protect constitutional right to vote). As a result of actions by the named defendants and those acting in concert with them, those constitutional rights were impeded in this case; some persons had to delay their visits to the clinic and

others had to be administered higher than normal levels of sedation prior to surgical procedures, thus creating unwarranted health risks. J.A. 151, 153, 154, 590. As is often the situation with medical treatment, the delay itself also exposed the patients to greater health risks. J.A. 155-156.

This case also involves the related "state interest in ensuring medical privacy." Pet. App. A16. The Florida Supreme Court explained that "Florida citizens are entitled to both unimpeded access to licensed medical facilities and freedom from unwanted confrontations and communications when undergoing lawful medical treatment, particularly where the effect of such confrontations is to place the patient's health and safety in jeopardy." *Ibid.* Protecting health care facilities from disruption is itself a legitimate state objective. See *NLRB* v. *Baptist Hospital, Inc.*, 442 U.S. 773 (1979) (upholding prohibition on labor soliciting in areas of hospital associated with patient care); *Roe* v. *Wade*, 410 U.S. 113, 150 (1973) (state has interest in seeing that abortion is performed "under circumstances that insure maximum safety for the patient"); *Medlin* v. *Palmer*, 874 F.2d 1085 (5th Cir. 1989) (upholding local ordinance forbidding operation of loudspeaker or sound amplifier within 150 feet of, inter alia, any hospital, nursing home, or facility that provides surgical services on an outpatient basis). The state interest in protecting residential privacy is significant as well. *Frisby* v. *Schultz*, 487 U.S. 474, 484 (1988).

Florida's interest in public safety and order, especially in the free flow of traffic and protection of property rights, is also substantial here. See *Cox* v. *New Hampshire*, 312 U.S. 569, 574 (1941) ("The authority of a municipality to impose regulations in order to assure the safety and convenience of the people in the use of public highways has never been regarded as inconsistent with civil liberties but rather as one of the means of safeguarding the good order upon which they ultimately depend."); *Schneider* v. *State*,

308 U.S. 147, 160 (1939) (municipal authorities have the duty to keep streets open and available for the movement of persons and property, the primary purpose to which streets are dedicated); *Heffron*, 452 U.S. at 650 (state interest in protecting the safety and convenience of those using a public forum is a valid governmental objective). The right of free and unimpeded access to places of businesses and to residences was also endangered in this case. See *Cox* v. *Louisiana*, 379 U.S. 536, 555 (1965) ("A group of demonstrators could not insist upon the right to cordon off a street, or entrance to a public or private building, and allow no one to pass who did not agree to listen to their exhortations.").

B. The Injunction is Narrowly Tailored To Serve the Significant Government Interests

A time, place and manner restriction is narrowly tailored if it "promotes a substantial government interest that would be achieved less effectively absent the" restriction. *Ward*, 491 U.S. at 799. In the case at bar, the trial court learned through extensive testimony that its less restrictive initial injunction did not adequately serve the significant government interests at stake. Each of the additional restrictions imposed was required in order to deal with violations of public and private rights that continued despite that prior injunction. The Florida Supreme Court thus aptly noted that "[t]he trial court found as a factual matter that each of these restrictions is necessary to counteract specific abuses * * * after entry of the permanent injunction nearly six months earlier. * * * [C]ompetent, substantial evidence supports all the trial court's factual findings." Pet. App. A17.

The determination as to whether a time, place and manner restriction is narrowly tailored must be made in light of the character of the particular location involved:

> The nature of a place, "the pattern of its normal activities, dictate the kinds of regulations of time,

> place, and manner that are reasonable." . . . The crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time.

Grayned v. *City of Rockford*, 408 U.S. 104, 116 (1972). The trial court here crafted remedies for unlawful activity incompatible with two locations—the clinic and the residences of clinic employees. In doing so, it tailored remedies that preserved the ability of the defendants to communicate their anti-abortion message, while restraining them from violating the rights of those who disagree with that message.

The trial court thus tailored the 36-foot buffer zone at the clinic in order to permit unimpeded access to the clinic by patients and staff. This zone simply requires that the defendants move to one side of the street and away from the driveway to the clinic, where they repeatedly had interfered with free access of patients and staff. See *Cameron* v. *Johnson*, 390 U.S. 611 (1968) (upholding statute that prohibited picketing that obstructed or unreasonably interfered with ingress or egress to or from public buildings, including courthouses, and with traffic on the adjacent streets sidewalks). Despite this access zone, the defendants still have full ability to express their message to all those who enter or pass in front of the clinic by displaying signs or by speaking from the area directly across the street from the only entrance to the clinic.[10]

The 300-foot buffer zone within which defendants are prohibited from uninvited physical approaches to patients was designed to counter the especially pernicious and unlawful stalking, shadowing, and other uninvited contacts by the defendants and those acting in concert with them

[10] In addition, the court specifically limited the width of the zone to only five feet on one side of the clinic to permit defendants access to the shoulder area of the highway. J.A. 57. The court also provided for a crosswalk to facilitate entrance to that area. J.A. 58.

repeatedly imposed on patients seeking to enter the clinic. See *International Society for Krishna Consciousness* v. *Lee*, 112 S. Ct. 2701, 2708 (1992) ("face-to-face solicitation presents risks of duress that are an appropriate target of regulation. The skillful, and unprincipled can target the most vulnerable, including those accompanying children or those suffering physical impairment and who cannot easily avoid solicitation"); cf. *Heffron* v. *International Society for Krishna Consciousness, Inc.*, 452 U.S. 640 (1981) (upholding state restriction of literature distribution at fair to booths, thus requiring listener-initiated contact). Once again, the imposition of this restriction does not prevent defendants from displaying their message within this zone through signs, through passively distributing leaflets within the zone to those who wish them, or from speaking within the zone. The limitation on loud noise and intrusive signs during surgical procedures and recovery periods is tailored to the state's undoubted interest in ensuring the health and safety of persons undergoing serious medical treatment; this regulation closely resembles the familiar "quiet" zones that typically surround hospitals treating surgical or seriously ill patients. Cf. *Grayned*, 408 U.S. at 116; *Boos* v. *Barry*, 485 U.S. 312, 332 (1988).

The 300-foot residential buffer zone imposed by the trial court applies to the residences of clinic employees. As in *Frisby* v. *Schultz*, *supra*, the type of activity restricted is targeted picketing, not speech aimed at the general public. The court acted because clinic employees and their families had been subjected to threatening conduct and harassment at their residences, which included apartment complexes (J.A. 493), condominiums (J.A. 550-551), and a motel (J.A. 173-179). The size of the buffer zone imposed by the court apparently was tailored to fit these residences, where the considerations are somewhat different from those affecting the single-family suburban homes involved in *Frisby*. See *also Burson* v. *Freeman*, 112 S. Ct. 1846,

1857 (1992) (upholding validity of 100-foot zone around polling place on election day and specifying that "question whether the 100-foot boundary line could be somewhat tighter" is not of "constitutional dimension" because difference between 100-foot zone and 25-foot zone is "a difference only in degree, not a less restrictive alternative in kind"); *Boos* v. *Barry*, 485 U.S. at 330-331 (upholding validity of 500-foot zone around embassy in which there is a ban on any assemblage of three of more people that poses a threat to the peace of the embassy).

C. The Injunction Leaves Open Ample Alternative Channels For Communication.

Despite the entry of the injunction, ample alternative channels remain available through which petitioners may communicate their anti-abortion message. Most important, the injunction does not bar defendants from communicating this message to the audience they most wish to reach: persons entering and leaving the Aware Woman Clinic. As noted above, the injunction permits the defendants to picket, demonstrate and communicate in a place adjacent to the clinic where all persons entering and leaving the clinic's parking lot are able to see them. They must remain only 36 feet (12 yards) from the clinic property. From their location across the street from the clinic, defendants are no more than 10 or 12 feet from cars entering or leaving the clinic. J.A. 486. As the Florida Supreme Court noted,

> Dixie Way [the road in front of the clinic] is only twenty-one feet wide in the area of the Clinic and for all practical purposes Operation Rescue will be able to convey its message just as effectively from the south side of the road as the north. * * * The only thing Operation Rescue will be unable to do from the south side that it could otherwise do from the north is block ingress to and egress from the Clinic.

Pet. App. A19.

Furthermore, the defendants remain completely free to communicate their message throughout the community by oral speech, publications, and the use of all other media, so long as they remain outside the very small geographic area specified in the injunction. Other means that have been used by defendants and those acting in concert with them include contacting patients by telephone and contacting patients and clinic employees by mail. J.A. 185-187, 567, 572-574. The record also reveals that there is a parking lot across the street from the clinic where literature can freely be distributed by defendants. J.A. 260, 470-471. In addition, defendants and those acting in concert with them publicize their views through counseling clinics elsewhere in the community. J.A. 471. Cf. *Lechmere, Inc.* v. *NLRB*, 112 S. Ct. 841, 849-850 (1992) (labor organizers had reasonable means available for informing employees of union's message without entering employer's parking lot because employees were not beyond the reach of the organizers through other means including mail, phone calls, signs near entrance and advertising).

III. THE BUFFER ZONES ARE NOT UNCONSTITUTIONAL PRIOR RESTRAINTS

Neither of the factors that have historically led the Court to insist on extremely close judicial scrutiny for "prior restraints" applies in the circumstances of this case. The limited time, place and manner restrictions imposed by the injunction here do not remotely constitute a total ban on particular speech, but permit defendants' speech-related activities at all other locations within the community. See *Arcara* v. *Cloud Books, Inc.*, 478 U.S. 697, 705-706 n.2 (1986); *Organization for a Better Austin* v. *Keefe*, 402 U.S. 415 (1971). Nor is there either prepublication censorship, *e.g.*, *New York Times, Co.* v. *United States*, 403 U.S. 713 (1971), or a licensing or regulatory system that leaves a would-be speaker's ability to use a public forum to the unfettered discretion of administrative officials. *E.g.*, *Southeastern Promotions, Ltd.* v. *Conrad*,

420 U.S. 546, 555 (1975). Indeed, in *Southeastern Promotions, Ltd.*, the Court recognized that "regulation of time, place or manner related to the nature of [a specific] facility" does not trigger application of the special scrutiny reserved for broad prior restraints. *Id.* at 555; see also *Hirsh* v. *City of Atlanta*, 495 U.S. 927, 927 (1990) (Stevens, J., concurring in denial of stay) (distinguishing injunction that imposes time, place, and manner restriction from injunction that constitutes a naked prior restraint).

The instant case also involves several of the other factors specifically identified in *Southeastern Promotions, Ltd.* as negating the presence of an unconstitutional prior restraint. See 420 U.S. at 555-556. Thus, the buffer zones imposed by the injunction relate directly to the nature and intended use of the clinic and private residences where they apply. Defendants' conduct was also not pure speech, and affected immediately and detrimentally the rights of other individuals. Defendants' expressive activities were, moreover, aimed at captive audiences both at the clinic[11] and at private residences of staff members. In the presence of similar factors, at least a dozen state and federal appellate courts have applied time, place and manner analysis to limited, site-specific injunctions against

[11] The captive audience problem at the clinic is particularly significant. The clinic has taken measures to exclude noise and other outside disturbances by erecting stockade fences around the clinic and a wall in front of it. The clinic also attempted to counter the impact of yelling and shouting by defendants by playing soft music from speakers at the clinic. See J.A. 273, 282-283, 284, 355-356, 542. Thus, although respondents did what they could to avert their eyes and ears from unwanted speech, they were thwarted in such efforts by harassment of persons entering and leaving the clinic and by persons placing ladders against the walls to display signs and shout at staff and patients; the clinic's speakers were also stolen. See J.A. 273, 284, 355-356, 459-462, 538-539, 542, 551, 553, 556.

blockading and harassment, and have not characterized such injunctions as impermissible prior restraints.[12]

In seeking to label the injunction here as a prior restraint, petitioners mischaracterize its terms and effect: The 36-foot clinic buffer zone, for example, does not "create[] a flat ban on all pro-life speech" within the zone as petitioners contend (Pet. Br. 38, 39). Because of defendants' prior conduct in using that zone to interfere with access to the clinic, the injunction excludes defendants and those acting in concert with them from that small critical area. Petitioners, however, still can transmit their speech into that zone verbally and through display of signs. In addition, persons sharing their views, but who are not acting in concert with them (and who therefore do not create the danger of impeding access to the clinic), can enter the zone and express anti-abortion speech.

The 300-foot clinic buffer zone similarly does not "require[] consent to speak or distribute literature" as

[12] See *Northeast Women's Center, Inc.* v. *McMonagle*, 939 F.2d 57, 62-63 (3d Cir. 1991); *New York State Nat'l Org. for Women* v. *Terry*, 886 F.2d 1339, 1363-1364 (2d Cir. 1989), cert. denied, 495 U.S. 947 (1990); *Portland Feminist Women's Health Center* v. *Advocates for Life, Inc.*, 859 F.2d 681, 686 (9th Cir. 1988); *Planned Parenthood Shasta-Diablo, Inc.* v. *Williams*, 16 Cal. Rptr. 2d 540, 544 (Ct. App.), review granted, 19 Cal. Rptr. 2d 492 (Cal. 1993); *Hirsh* v. *City of Atlanta*, 401 S.E.2d 530, 533 (Ga.), cert. denied, 111 S. Ct. 2836 (1991); *Planned Parenthood League* v. *Operation Rescue*, 550 N.E.2d 1361 (Mass. 1990); *Horizon Health Center* v. *Felicissimo*, 622 A.2d 891, 897-899 (N.J. Sup. Ct. App. Div.), cert. granted, 634 A.2d 527 (1993); *Kaplan* v. *Prolife Action League*, 431 S.E.2d 828, 842-844 (N.C.), review denied, 436 S.E.2d 379 (1993), petition for cert. pending, No. 93-1159; *Fargo Women's Health Org., Inc.* v. *Lambs of Christ*, 488 N.W.2d 401, 407 (N.D. 1992); *Dayton Women's Health Center* v. *Enix*, 589 N.E.2d 121, 126-127 (Ohio Ct. App. 1991), cert. denied, 112 S. Ct. 3033 (1992); *Klebanoff* v. *McMonagle*, 552 A.2d 677, 678-682 (Super. Ct. 1988), appeal denied, 563 A.2d 888 (Pa. 1989); *Valenzuela* v. *Aquino*, 800 S.W.2d 301, 304 (Ct. App. 1990), aff'd in part & rev'd in part on other grounds, 853 S.W.2d 512 (Tex. 1993); *Bering* v. *Share*, 721 P.2d 918, 925 (Wash. 1986), petition for cert. dismissed for want of jurisdiction, 479 U.S. 1050 (1987).

petitioners contend (Pet. Br. 38, 40). Petitioners are completely free to direct speech towards anyone in the zone, so long as they do not "physically approach" persons seeking clinic services unless the person consents. Nor does the fact that petitioners must permit a person to leave or walk away if the person does not want to receive a certain message "empower[] private citizens with injunctive authority to permanently restrain speech." *Id.* at 40. The injunction simply guarantees to clinic patients the right that this Court has repeatedly recognized of an unwilling audience to avert its eyes and ears from unwanted speech. See *Frisby* v. *Schultz*, 487 U.S. 474, 484 (1988). And even when a patient walks away, petitioners are not prevented from communicating so that the person can hear them, but only from physical approaches and harassment. See *Kovacs* v. *Cooper*, 336 U.S. 77, 86 (1949) (noting that when Court previously had upheld right to door-to-door soliciting it was because homeowner could "protect himself from such intrusion by an appropriate sign 'that he is unwilling to be disturbed.' The Court never intimated that the visitor could insert a foot in the door and insist on a hearing").[13]

Petitioners here also can distribute literature within the 300-foot zone, although they cannot physically approach persons seeking clinic services in order to do so. Petitioners are completely free to distribute literature from a booth or other location that does not involve any

[13] The part of the injunction that provides for "invited contact" (see J.A. 63), also is not a prior restraint or a "discretionary license to suppress speech" (Pet. Br. 41-42). It does not ban any speech by petitioners. All it does is restrict the manner in which they can communicate their message to clinic employees and patients. It preserves the employees' and patients' right not to be forced into receiving unwanted communication from a person in direct physical contact with them. This restriction on the manner of communicating is more than justified by the record in the case. cf. *Frisby*, *supra*; *Schneider* v. *State*, 308 U.S. 147, 162 (1939) (right to distribute literature only "to one willing to receive it").

physical approach. Cf. *Heffron* v. *International Society for Krishna Consciousness*, 452 U.S. 640 (1981)(limiting distribution to booth at fair grounds upheld as reasonable time, place and manner restriction). Enjoining petitioners from forcing leaflets upon persons who do not want them is not an unconstitutional prior restraint, but rather a protection of rights of members of a captive audience to attempt to avoid unwanted speech. See *Schneider* v. *State*, 308 U.S. at 160 ("a group of distributors could not insist upon a constitutional right to form a cordon across the street and to allow no pedestrian to pass who did not accept a tendered leaflet").

The 300-foot residence buffer zone applies only to the residences of clinic employees; it does not constitute a "total ban on residential picketing" (Pet. Br. 40). The object of this restriction, based on evidence of prior abuses, is picketing directed at specific residences, not speech aimed at the general public. As in *Frisby*, "[t]he type of picketers banned by the [injunction] generally do not seek to disseminate a message to the general public, but to intrude upon the targeted resident and to do so in an especially offensive way." *Id.* at 486. Finally, the ban on "sounds or images observable to or within earshot of the patients inside the Clinic" is also not a total ban on such speech, as petitioners repeatedly assert (Pet. Br. 38, 39 n.27; 40), but is carefully limited to the time of surgical procedures and recovery periods—7:30 a.m. through noon, Mondays through Saturdays. J.A. 59. Cf. *Kovacs* v. *Cooper*, 336 U.S. 77, 87 (1949)(upholding ordinance that prohibited sound trucks which emit "loud and raucous" noises from public streets, because in home or on street unwilling listener "is practically helpless to escape this interference with his privacy by loud speakers except through the protection of the municipality").

IV. THE STATE COURT'S INJUNCTION DOES NOT VIOLATE FIRST AMENDMENT RIGHTS OF FREEDOM OF ASSOCIATION AND IS NOT UNCONSTITUTIONALLY OVERBROAD OR VAGUE

Both Florida Rule of Civil Procedure 1.610(c) and Federal Rule of Civil Procedure 65 provide that injunctive relief may be binding upon "parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise." Fed. R. Civ. P. 65(d). The injunction in this case is framed pursuant to the terms of that rule.

Petitioners contend that the "in concert with" provision of the injunction renders it unconstitutional on various grounds. Pet. Br. 24-30 (overbreadth), 7, 32 (vagueness); 45-49 (freedom of association). As a threshold matter, there is no need for the Court to consider the injunction's application to persons other than the petitioners. In *Regal Knitwear Co.* v. *NLRB*, 324 U.S. 9 (1945), a party subject to an order entered by the National Labor Relations Board argued that the order was invalid because of a provision that it applied to "successors and assigns" of the enjoined party. This Court, noting that the party before it was not a successor or assign, characterized the matter as "an abstract controversy over the use of these words," and declined to decide under what circumstances a successor or assign could be liable for violation of the order. *Id.* at 15. Here, similarly, the petitioners are all named defendants; no issue is presented regarding the injunction's application to other persons.[14]

[14] To the extent petitioners claim that they are not affiliated with the other named defendants (Pet. Br. 7, 44-46), that factual determination is not before the Court because it is not included in the questions presented. Petitioners' claim is, moreover, directly contradicted by the record. Petitioners each stipulated that they are active in and members of an organization known as "Operation Rescue America," another named defendant. Stipulation, Jul. 30, 1992, at 1. Included as an exhibit to respondents' verified petition for injunction is a flyer announcing that "Rescue America presents Operation Rescue: In Central Florida" at a rally on October 25, 1991, and provides the names of all three petitioners along with their telephone numbers as persons to contact for more information. R. 8; see also J.A. 108, 110-111, 414-416. The court found that Rescue America literature directs that "their members should ignore the law of the State and the police officers who remove them from their blockading positions." J.A. 7. The trial court found that the petitioners were members of Operation Rescue and Operation Rescue America. J.A. 6.

The Florida Supreme Court did not disturb these factual findings, and petitioners offer no justification for this Court to disturb them.

In all events, the restraint on those acting in concert with defendants does not render the injunction unconstitutional. Rule 65(d) derives from "the common-law doctrine that a decree of injunction not only binds the parties defendant but also those identified with them in interest, in 'privity' with them, represented by them or subject to their control." *Regal Knitwear Co.*, 324 U.S. at 14. That doctrine is necessary to prevent an enjoined defendant from evading the restraints imposed by an injunction by simply finding someone else to do his or her bidding. *Ibid.* This consideration is particularly important in a case such as this one, where the defendants include organizations and might otherwise evade the injunction by replacing any specifically enjoined protestors with other persons. See *Cheffer* v. *McGregor*, 6 F.3d at 713-714, 715 n.6 (Paine, J., dissenting). Moreover, it was valid for the injunction to restrain *only* the named defendants and those acting in concert with them. As other courts have noted in similar cases, it is only such persons who have been shown to be engaging in the behavior that has given rise to the need for injunctive relief. *E.g.*, *McMonagle*, 939 F.2d at 62-63; *Felicissimo*, 622 A.2d at 898.

Nor does the "in concert with" provision violate petitioners' freedom of association or unlawfully restrict group advocacy. Petitioners are not enjoined from

associating with others or from joining with them in holding or expressing a particular viewpoint. There is no constitutional right to act in concert with others so as to deprive third parties of legally protected rights.

Petitioners' claim that the term "in concert with" should be declared unconstitutionally vague is also without merit. This Court on several occasions has indicated the appropriateness of using that term in valid injunctions. See, *e.g.*, *Allee* v. *Medrano*, 416 U.S. 802, 809 (1974)(noting that state court injunction was "quite limited [because it] proscribes picketing by the appellees [the union and certain individuals] and those acting in concert with them only on or near property owned by [employer]"); cf. *Golden State Bottling Co.* v. *NLRB*, 414 U.S. 168, 177-180 (1973) (holding that under Fed. R. Civ. P. 65(d) even a bona fide purchaser can be considered in privity with its pre-decessor where the purchaser knew of an unremedied wrong).

Petitioners' other vagueness challenges (Pet. Br. 30-37) and related overbreadth challenges (*id.* at 28-29) should be rejected as well. The injunction does not "forbi[d] or requir[e] the doing of an act in terms so vague that [persons] of common intelligence must necessarily guess at its meaning and differ as to its application." *Connally* v. *General Construction Co.*, 269 U.S. 385, 391 (1926). The Florida Supreme Court correctly found that, in the specific factual context here, the injunction does not require persons of average intelligence to "guess at its meaning and differ as to its application." Pet. App. A21. Nor do words such as "agents," "prompt," and "approaching," inject unconstitutional vagueness. By using terms "marked by flexibility and reasonable breadth, rather than meticulous specificity," the trial court's injunction properly "delineate[d] its reach in words of common understanding." *Grayned*, 408 U.S. at 110, 112; *Boos* v. *Barry*, 485 U.S. at 332.

Petitioners specifically challenge, as unconstitutionally vague and overbroad, the phrase "sounds or images observable to or within earshot of the patients inside the clinic." The use of this phrase must be assessed in light of the record of the case. That record shows that the only images observable to persons "inside the clinic" are those hoisted above the clinic fences by demonstrators who climb on ladders to harass patients within the clinic grounds. See J.A. 284, 355-356, 459-462, 542. Persons of average intelligence can likewise reasonably determine how far the noise they are making travels. See, *e.g.*, *Grayned*, 408 U.S. at 107-08 (upholding against vagueness challenge, statute that forbade "the making of any noise or diversion which disturbs or tends to disturb the peace or good order of [a] school session or class thereof" by a person on grounds adjacent to school building); *Kovacs* v. *Cooper*, 336 U.S. 77, 79 (1949)(upholding against vagueness challenge the use of the terms "loud and raucous" to describe prohibited noises because the words "through daily use acquired a content that conveys to any interested person a sufficiently accurate concept of what is forbidden"). The Florida Supreme Court pointed out that each of the injunction's restrictions was aimed at a specific past abuse so that the defendants were on notice of the conduct being prohibited. Pet. App. A21.

CONCLUSION

The judgment of the Supreme Court of Florida should be affirmed.

Respectfully submitted.

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INTEREST OF AMICI

Amici are parties to the underlying litigation in this case.

SUMMARY OF ARGUMENT

The Supreme Court of Florida reviewed the anti-speech portions of the challenged injunction under the "time, place, and manner" test. This was clear error. The anti-speech portions of the injunction before this

Court trigger—and violate—the doctrine of prior restraints.

This Court has never reviewed speech-restrictive injunctions under the "time, place, and manner" test for legislative enactments. On the contrary, this Court has repeatedly subjected anti-speech injunctions to the heightened standards governing prior restraints. *E.g., Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971); *National Socialist Party of America v. Village of Skokie*, 432 U.S. 43 (1977); *Carroll v. President of Princess Anne*, 393 U.S. 175 (1968).

As this Court has frequently observed, the elimination of prior restraints was a leading purpose of the First Amendment. *E.g., Carroll*, 393 U.S. at 181 n.5. Prior restraints represent the most serious and least tolerable infringement on free speech. *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976). Injunctions do not just "chill" speech—they "freeze" communication before it takes place. Anti-speech injunctions, unlike generally applicable legislative enactments, inherently partake of censorship because they apply selectively to those bearing a particular message. Speakers who proceed despite injunctions face streamlined contempt proceedings and typically lose the opportunity to raise constitutional defenses because of the collateral bar rule. *See Walker v. City of Birmingham*, 388 U.S. 307 (1967). Injunctions impose blanket advance prohibitions on certain expressive activities (e.g., "picketing" in certain places) rather than applying hindsight to distinguish otherwise lawful activities from criminal or tortious abuses. Injunctions against otherwise lawful expressive activities make judges one-man legislatures, eliminating the possibility of disinterested trial court review of the speech restrictions. Injunctions circumvent the checks, balances, and delays of the legislative and criminal process and instead impose instant restrictions on speech "by the stroke of a pen."

The "time, place, and manner" test which the Supreme Court of Florida used to review the present injunction is also inappropriate by its very terms. ***Regulations*** on speech in public fora are the exclusive province of representative government bodies, not the prerogative of civil plaintiffs. Furthermore, private plaintiffs have no standing to assert the *governmental* interests necessary to sustain time, place, and manner regulations.

Reaffirmation of the distinction between injunctive prior restraints and legislative time, place, and manner regulations is essential in light of the recent departure from this rule by a number of lower courts, including the court below. These courts have disregarded the distinction between ordinances and injunctions and have badly confused the elements of prior restraints with this Court's jurisprudence regarding content-neutrality.

Under the proper test—the doctrine of prior restraints—the anti-speech injunctive restrictions at issue here are unconstitutional. Anti-abortion speech does not fit into any exception to the prior restraint doctrine, such as obscenity or "fighting words." Nor does any grave countervailing interest override the right to engage in peaceful free speech outside abortion businesses. Finally, the sweeping injunctive restrictions fail to draw the necessary distinctions between genuinely unlawful conduct and legitimate public expressive activity.

This Court must reverse the judgment of the Supreme Court of Florida.

ARGUMENT

"The elimination of prior restraints was a leading purpose in the adoption of the First Amendment." *Carroll v. President of Princess Anne*, 393 U.S. 175, 181 n.5 (1968) (internal quotation marks and citation omitted). *Accord Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 713 (1931). The decision of the court below in the present case strikes at the heart of this constitutional guarantee.

The Supreme Court of Florida treated the amended permanent injunction at issue as if it were a municipal ordinance subject to the "time, place, and manner" test for regulations on speech. This represents a fundamental jurisprudential error. Anti-speech injunctions trigger the doctrine of prior restraints, not the more deferential test for time, place, and manner regulations.[1] Under the doctrine of prior restraints, the speech-restrictive portions of the injunction at issue are plainly unconstitutional.

I. INJUNCTIVE RESTRICTIONS ON EXPRESSIVE ACTIVITIES TRIGGER THE DOCTRINE OF PRIOR RESTRAINTS.

A provision in an injunction which restricts a person's freedom of speech triggers the strictest standard of constitutional review: the doctrine of prior restraints.

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[1] The "time, place, and manner" test provides that in public fora, government may "enforce regulations of the time, place, and manner of expression which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication." *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983).

Amici believe the challenged injunctive provisions fail the time, place, and manner test. Nevertheless, reaffirmation of the prior restraint doctrine is crucial as a jurisprudential matter, as explained herein, in light of the recent doctrinal confusion among lower courts. *Infra* § I(C).

A. This Court Has Consistently Treated Anti-Speech Injunctions as Prior Restraints.

"Temporary restraining orders and permanent injunctions—i.e., court orders that actually forbid speech activities—are classic examples of prior restraints." *Alexander v. United States*, 113 S. Ct. 2766, 2771 (1993) (citation omitted). "The term prior restraint is used to decribe administrative and judicial orders forbidding certain communications when issued in advance of the time that such communications are to occur." *Id.* (internal quotation marks, emphasis, and citation omitted). The speaker who proceeds in the face of a prior restraint faces punishment simply for violating the dictates of the restraint, regardless of whether the expressive activity would have been otherwise lawful. Subsequent punishment schemes, by contrast, only impose sanctions for specific tortious or criminal conduct. The "time-honored distinction between barring speech in the future and penalizing past speech . . . is critical to our First Amendment jurisprudence." *Id.* at 2773. "Behind the distinction is a theory deeply etched in our law: a free society prefers to punish the few who abuse rights of speech *after* they break the law than to throttle them and all others beforehand." *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 559 (1975) (emphasis in original).

Thus, while statutes, ordinances, and regulations[2] restricting speech trigger the traditional "time, place and manner" analysis, *e.g.*, *Grayned v. City of Rockford*, 408 U.S. 104 (1972) (statute); *Frisby v. Schultz*, 487 U.S. 474 (1988) (ordinance); *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984) (regulations),

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[2] The reference here is to laws setting forth substantive norms for conduct. Advance permit or licensing schemes, by contrast, even when enacted as ordinances or regulations, constitute classic prior restraints. *E.g.*, *Freedman v. Maryland*, 380 U.S. 57 (1965) (license for exhibition of motion pictures); *Lovell v. Griffin*, 303 U.S. 444 (1938) (permit for literature distribution).

injunctions trigger the much stricter doctrine of prior restraints, *e.g., National Socialist Party of America v. Village of Skokie*, 432 U.S. 43 (1977) (per curiam) (injunction against marches, distribution of pamphlets, and display of materials); *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971) (injunction against distribution of literature); *Carroll v. President of Princess Anne*, 393 U.S. 175 (1968) (court order restraining public rallies and meetings); *New York Times Co. v. United States*, 403 U.S. 713 (1971) (per curiam) (injunction against publication of classified government documents).

"The thread running through all these cases is that prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976).

B. Injunctive Restrictions in Private Litigation Cannot Qualify as Government Regulations of Time, Place and Manner.

As noted in the preceding section, injunctions against expressive activity trigger the strict doctrine of prior restraints, not the more deferential standard of time, place, and manner regulations. This Court has recently reaffirmed this "time-honored distinction," calling it "critical" to First Amendment jurisprudence. *Alexander*, 113 S. Ct. at 2773. There are very strong reasons for maintaining this categorical distinction.

1. *Injunctions pose greater risks to free speech than do uniform governmental regulations.*

Injunctions against expressive activity pose heightened threats to free speech, making the strict doctrine of prior restraints especially important.

a. *Irreparable loss of opportunity to communicate*

Time is often of the essence in matters of free speech. This is especially true when the opportunity to reach the intended audience is fleeting or when the value of the message is time-sensitive.[3] Injunctive restraints devastate the timeliness of speech:

> Prior restraints fall on speech with a brutality and a finality all their own. Even if they are ultimately lifted they cause irremediable loss—a loss in the immediacy, the impact, of speech . . . Indeed it is the hypothesis of the First Amendment that injury is inflicted on our society when we stifle the immediacy of speech.

A. Bickel, *The Morality of Consent* 61 (1975). "A prior restraint, . . . by definition, has an immediate and irreversible sanction. If it can be said that a threat of criminal or civil sanctions after publication 'chills' speech, prior restraint 'freezes' it at least for the time." *Nebraska Press Ass'n*, 427 U.S. at 559 (footnote omitted).

b. *Discrimination*

A statute or ordinance applies uniformly, while an injunction imposes special legal restrictions only upon a particular group of people. If the enjoined acts are otherwise lawful—like engaging in expressive activities on a public sidewalk—then the injunction essentially defines a new offense which applies only to certain people. This

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[3] In the case at bar, for example, pro-life picketers and sidewalk counselors address their message, *inter alia*, to passersby and those entering the Aware abortion business. While the availability of a generic "audience" persists over time, this audience is certainly not fungible. Rather, each passerby, each woman entering Aware for an abortion, each companion of a person seeking pregnancy counseling, represents an individual who may never pass that way again and for whom the information offered may represent a "now-or-never" alternative.

injunctive creation of substantive offenses inherently results in unequal legal treatment.

In the present case, for example, those who *support* abortion, or those who protest anything *but* abortion, are free to assemble on the sidewalk outside the Aware abortion business—yet pro-life citizens may not. Am'd Perm. Injunc. ¶ 3 (Pet. App. B-7). Those seeking signatures on a petition regarding the conflict in Bosnia may freely approach women going into Aware within 300 feet of the building, but those offering information on alternatives to abortion must wait for the women to initiate communication. *Id.* ¶ 5 (Pet. App. B-8). Holocaust survivors who suspect a Melbourne, Florida resident of being an escaped Nazi war criminal may carry protest signs within 30 feet of his home, but pro-life individuals may not do the same within 300 feet of an abortionist's residence. *Id.* ¶ 6 (Pet. App. B-9). *Cf. Judge Allows Residential Pickets: Demonstrators to Return to Demjanjuk Home*, The Plain Dealer (Cleveland), Dec. 16, 1993, at 1B (court overturned ordinance and allowed Jewish activists to picket Demjanjuk). Such blatant discrimination among expressive activities in public places constitutes "censorship in a most odious form, unconstitutional under the First and Fourteenth Amendments." *Carey v. Brown*, 447 U.S. 455, 463 n.7 (1980) (citation and quotation marks omitted). *See also Lamb's Chapel v. Center Moriches Union Free School Dist.*, 113 S. Ct. 2141 (1993) (First Amendment forbids viewpoint discrimination).

c. *Denial of defenses*

Those alleged to have violated an ordinance retain the full range of due process rights and substantive defenses. Moreover,

> [a] criminal penalty or a judgment in [an action for damages] is subject to the whole panoply of protections afforded by deferring the impact of the judgment until all avenues of appellate review have been exhausted. Only after judgment has become final, correct or otherwise, does the law's sanction become fully operative.
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> A prior restraint, by contrast and by definition, has an immediate and irreversible sanction.

Nebraska Press Ass'n, 427 U.S. at 559. Those alleged to have violated an injunction typically face summary contempt proceedings with virtually no opportunity to raise any defense other than denial of the alleged acts.

In particular, the "collateral bar rule" prevents alleged contemnors from defending themselves by challenging the constitutionality of the underlying injunctive restrictions. *E.g. Walker v. City of Birmingham*, 388 U.S. 307 (1967). As one commentator observed, anti-speech injunctions yield the situation of a "prosecuted speaker who has a good first amendment claim on the merits but can only tell it to the wind." Blasi, *Toward a Theory of Prior Restraint: The Central Linkage*, 66 Minn. L. Rev. 11, 83 (1981).

d. *Advance, categorical prohibition*

Injunctions dramatically contract expressive liberty by imposing advance *fiats* which bind regardless of whether the actual conduct ultimately proves not to violate any norm of tort or criminal law.

Much of the expressive liberty the people of this nation enjoy consists of that "breathing space" which exists *between* the twin poles of criminal behavior and pristine free speech. This "breathing space" is essential for First Amendment freedoms. *NAACP v. Button*, 371 U.S. 415, 433 (1963). Of perhaps greater practical importance, this "breathing space" is the safe haven for countless daily activities. The manifold expressive human acts which do not violate the elements of any crime or tort remain liberties even without case law placing these activities squarely within the First Amendment.

Subsequent punishment schemes preserve this expanse of liberty: the speaker avoids punishment unless the actual conduct undertaken proved unlawful. Injunctive restraints, by contrast, eliminate this "middle ground" of freedom: expressive conduct which the injunction categorically defines in advance as unlawful (e.g., "picketing" at a certain place) becomes an *ipso facto* basis for sanctions, even if the actual activity was otherwise completely lawful and unobjectionable.

Suppose, for example, that boycott advocates are accosting customers. Some press their case in a rude, intrusive manner; others, while insistent, are completely civil and courteous. An injunction against "approaching another without any indication of a desire to communicate" would destroy the liberty of the boorish and the genteel alike; a disorderly conduct or disturbing the peace statute, by contrast, would weed out, with the 20-20 vision of hindsight, only the true offenders.

e. *Denial of impartial judicial review*

The task of a court is to *review* a law, not to *draft* one. When a judge issues a substantive injunction, he effectively removes one level of judicial review. Just as a former legislator appointed to the bench ought not to hear a case challenging a law he himself authored, so a judge ought not to be in the position of judging an injunction he himself crafted.

Furthermore, "[m]any judges who have issued injunctions may feel a personal stake in the enforcement of their order," Blasi, *supra*, at 61, and "may be overly sensitive to perceived affronts to their authority," *id.* at 23. The daunting prospect of facing in a contempt proceeding the very judge who issued the order doubtless exerts a powerful chilling effect on expressive activity. Prosecutors exercise considerable discretion in deciding whether to charge the occasional misstep or bravado of the political demonstrator. But the judge who has personally enjoined

the demonstrators may feel a strong—and understandable—need to vindicate his own credibility and authority in the face of careless or defiant protesters. Meanwhile, the civil plaintiff's microscopic surveillance of the demonstrators, coupled with that plaintiff's vigorous goading of contempt enforcement, aggravates both the potential judicial bias and the legitimate fear of the would-be speaker. These distorting factors are largely absent in a regime of subsequent punishment, where the "affront" is to the legislature or executive, not to the judge.

f. *Avoidance of legislative and prosecutorial checks on speech restrictions*

Injunctions also circumvent the built-in institutional checks of legislative and prosecutorial action, checks which can safeguard freedom of expression against excessive ease or haste in suppressing speech. The doctrine of prior restraints therefore provides a vital curative. As one commentator explained:

> Injunctions are issued . . . "by a stroke of a pen." . . .
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> [T]raditional principles of equity . . . are not likely to deter or seriously delay regulatory agents who desire to invoke legal authority to suppress speech. *Were it not for the additional adverse presumption imposed by the doctrine of prior restraint, the swiftness and relatively streamlined nature of the procedures by which injunctions are issued could be expected to attract regulatory agents in droves.* Overuse of the power to regulate speech is likely under such conditions, particularly in light of the political gains some regulatory agents may achieve when the public's cry for suppression can be satisfied while emotions are still running high.
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> . . . .
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> Under the subsequent punishment regimes, in contrast, the process by which regulatory impulses are

implemented is far more complicated, drawn out, and interlaced with disincentives.

Blasi, *supra*, at 58-59 (emphasis added). In short, "suppression by a stroke of the pen is more likely to be applied than suppression through a criminal process [and, moreover, injunction suits] do not require attention to the safeguards of the criminal process . . . ." T. Emerson, *The System of Freedom of Expression* 506 (1970).

Judicial creation of new substantive laws, by means of an injunction, bypasses and denigrates the legislative function of elected, representative bodies. City councils and state legislatures have the task of making policy judgments regarding what laws to enact defining offenses and regulating conduct. If a city council enacts an ordinance creating "speech-free zones" around certain facilities or otherwise restricting public expressive activities, those aggrieved are free to challenge that law in a civil rights action. If, on the other hand, city officials *decline* to enact a restriction on certain expressive activities, a court should not substitute its judgment for that of elected officials by imposing the same restriction in injunctive form. Courts are not back-up legislatures. *Cf. New York Times Co. v. United States*, 403 U.S. 713, 742 (1971) (Marshall, J., concurring) (Constitution does not provide for "government by injunction" in which courts may "make law"); *id.* at 731 (White, J., concurring) (prior restraint not justified, "at least in the absence of express and appropriately limited [legislative] authorization"). Furthermore, such misuse of the judiciary overburdens the courts and encourages elected officials to evade responsibility by referring citizen complaints to judges.

Courts refuse to rewrite unconstitutional laws; nor should a court write the law in the first place in the form of a substantive injunction. *Cf. Gregory v. Chicago*, 394 U.S. 111, 118 (1969) (Black, J., concurring) ("It is not our duty and indeed not within our power to set out and define with precision just what statutes can be lawfully

enacted to deal with situations like the one confronted here by police and protestors"); *cf. also Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 299 (1984) ("We do not believe . . . that . . . the time, place, or manner decisions assign to the judiciary the authority to replace [government officials] as the manager of [public forum property]").

The doctrine of prior restraints establishes a constitutional barrier to the abuse of the judiciary and a constitutional safeguard for free speech rights. By evaluating the injunction at issue under the time, place, and manner standard applicable to legislation, the Supreme Court of Florida nullified these constitutional safeguards.

2. *"Time, place and manner regulation" of public forum property is the exclusive prerogative of government.*

Private litigants lack the authority to "regulate" public forum property. A governmental body, like a private property owner, retains the authority (subject to constitutional limitations) to decide for itself how best to control the use of property under its control. *Adderley v. Florida*, 385 U.S. 39, 47 (1966). But a *private* entity by definition neither owns nor controls *public* forum property; hence, private entities have no authority to assume regulatory control over public rights of way or other government property—indeed, to do so would be to usurp this prerogative of ownership.

This is not to say that private persons have no right to *redress* for injuries to their private interests. The point rather is that *regulatory* authority—that authority which the time, place, and manner test governs—is the exclusive prerogative of representative government. For example, a private litigant may have government agents enforce existing government regulations against loitering or parading without a permit. But in the absence of such regulations, a private entity may not simply sue to

impose loitering or parade permit restrictions on the use of streets and sidewalks. Likewise, an abortion business—a private entity—can assert no power to "regulate" adjacent public sidewalks.

3. *Private parties lack standing to assert government interests.*

A related point is that private litigants lack *standing* to assert *government interests*. The "time, place, and manner" test inquires whether a given restriction is narrowly tailored to further some "significant *government* interest." *United States v. Grace*, 461 U.S. 171, 177 (1983) (emphasis added; citation omitted). There are many potentially assertable government interests. Such interests are frequently in tension with each other (e.g., maximizing safety vs. maximizing personal liberty). The essence of legislative prerogative is the selection among, and balancing of, these diverse interests.

Elected representatives must decide whether to restrict pornography dealers, for example, in the interest of family welfare, or leave such enterprises to the forces of the marketplace, in the interest of promoting commercial liberty. Similarly, government officials must decide whether or not to require parental consent for abortions by minor women, whether or not to ban targeted residential picketing, whether or not to forbid solicitation in airport terminals, and so forth. All of these *potential* regulations require *governmental* selection among competing *governmental* interests. Private entities cannot dictate the outcomes in these discretionary matters by invoking "government interests" for their own private benefit. On the contrary, private litigants have standing only to assert their own *private* interests. A plaintiff cannot claim that because the *government* could restrict plaintiff's adversaries with a certain law, *plaintiff* may sue to have a court impose a similar restriction. As this Court explained in a

different context in *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208 (1974),

> [t]o permit a complainant who has no concrete [i.e., personal] injury to require a court to rule on important constitutional issues in the abstract would create the potential for abuse of the judicial process, distort the role of the Judiciary in its relationship to the Executive and the Legislature and open the Judiciary to an arguable charge of providing "government by injunction."

Id. at 222. Thus, by its very terms, the time, place, and manner test for implementing *government* interests is entirely inapposite to *private party* litigation.[4]

C. Reaffirmance of the Traditional Doctrine of Prior Restraints Is Necessary in Light of the Recent Disregard by Lower Courts of This Court's Teachings.

The need to reaffirm the applicability of the prior restraint doctrine to anti-speech injunctions is particularly important today. Over the last eight years, lower courts have tended with increasing frequency to disregard or reject this Court's teachings on this question.

The Florida Supreme Court in this case committed two basic errors regarding the constitutional review of anti-speech injunctions:

(1) replacing the prior restraint doctrine with the "time, place, and manner" test; and,

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[4] It is no answer to point out the obvious fact that the court is a government actor. The role of the court in private litigation is to mediate disputes between private interests, not to intervene as plenipotentiary government regulator. Thus, while judicial action remains "state action" under the Fourteenth Amendment, the court's jurisdiction extends only to the conflicting private interests presented to the court. To hold otherwise would be to mock the concept of judicial restraint.

(2) limiting the prior restraint doctrine to content-based injunctions.

These errors typify the very recent confusion of many lower courts over the prior restraint doctrine.

1. *Lower courts have confused the standards governing injunctions and ordinances.*

The basic, categorical error of the court below consisted in applying the wrong standard—the time, place, and manner test—to the injunction at issue. This categorical error permeates recent lower court decisions reviewing anti-speech injunctions.

This Court has *never* examined an anti-speech injunction under the "time, place, and manner" standard. This is no mere coincidence. *Supra* § I(A), (B). Faced with a complete lack of pertinent authority, lower courts have nevertheless sought to justify their departure from this rule either by *ipse dixit* (i.e., no citation of authority)[5] or by citation of non-injunction cases (i.e., misappropriation of inapposite cases).

Apparently the first decision clearly to depart from this Court's teaching on the difference between injunctive prior

[5] A flagrant example of this appears in *Murray v. Lawson*, 264 N.J. Super. 17, 624 A.2d 3 (App. Div.), *certif. granted*, 133 N.J. 445, 627 A.2d 1149 (1993). The Appellate Division of the Superior Court of New Jersey made the following astonishing declaration, without citing any authority whatsoever: "neither the United States Supreme Court, nor our [New Jersey] Supreme Court, have ever suggested that regulation of protected speech by injunction, rather than by legislation, must be judged under a different, stricter standard." 264 N.J. Super. at 35, 624 A.2d at 13.

To the same effect is the following unsupported assertion in *Ramsey v. Edgepark, Inc.*, 66 Ohio App. 3d 99, 109, 583 N.E.2d 443, 450, *review dismissed*, 53 Ohio St. 3d 712, 560 N.E.2d 780 (1990): "While the case before us does not arise in the context of a legislative ban on targeted picketing, but arises in the context of whether a court may protect a residence from targeted picketing in the interest of protecting the right to privacy, the underlying rationale remains the same."

restraints and legislative time, place, and manner regulations was *Bering v. SHARE*, 106 Wash. 2d 212, 721 P.2d 918 (1986), *cert. dismissed*, 479 U.S. 1050 (1987). In upholding (over vigorous dissents) sweeping, draconian restrictions on pro-life picketing and leafletting, the *Bering* court applied the "time, place, and manner" test, 106 Wash. 2d at 222, 721 P.2d at 925, citing this Court's decisions in *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984); *United States v. Grace*, 461 U.S. 171 (1983); and *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983). *Clark*, *Grace*, and *Perry* admittedly recite the elements of the "time, place, and manner" test; however, none of these cases involved injunctions.

The *Bering* court's failure to grasp this Court's articulation of the prior restraint doctrine appeared even more plainly later in its opinion, when the court purported to confront the doctrine directly. 106 Wash. 2d at 235-36, 721 P.2d at 932. In its discussion, the Washington supreme court listed a string of decisions by this Court reviewing statutes, ordinances, and regulations, and then stated: "Several of these cases are classic prior restraint cases, yet the doctrine is unmentioned." *Id.* at 236, 721 P.2d at 932. The Supreme Court of Washington apparently thought that *this* Court had forgotten what a prior restraint is. In fact the reverse was true.

In the years after *Bering*, other lower courts have followed *Bering*'s lead, invoking *non-injunction* cases[6] for the "time, place, and manner test," and then applying that test to *injunctive* restrictions on expressive activities.[7]

[6] In addition to *Clark*, *Grace*, and *Perry*, these errant decisions cite *Heffron v. ISKCON*, 452 U.S. 640 (1981); *Adderley v. Florida*, 385 U.S. 39 (1966); and *Grayned v. City of Rockford*, 408 U.S. 104 (1972). *See infra* note 7.

[7] *See, e.g., Chico Feminist Women's Health Center v. Scully*, 208 Cal. App. 3d 230, 256 Cal. Rptr. 194 (1989) (citing *Perry*, *Heffron*); *Planned Parenthood Ass'n of Cincinnati, Inc. v. Project*

Curiously, these cases seemingly always arise in the context of anti-abortion demonstrations, raising the question whether a result-oriented mentality might not be at work.[8]

Jericho, 52 Ohio St. 3d 56, 556 N.E.2d 157 (citing *Grace*, *Perry*, *Heffron*, *Grayned*, *Adderley*), *reh'g denied*, 53 Ohio St. 3d 706, 558 N.E.2d 61 (1990); *Fargo Women's Health Organization, Inc. v. Lambs of Christ*, 488 N.W.2d 401 (N.D. 1992) (citing *Perry*), *appeal after remand*, 502 N.W.2d 536 (N.D. 1993); *Murray v. Lawson*, 264 N.J. Super. 17, 624 A.2d 3 (App. Div.) (citing *Perry*), *certif. granted*, 133 N.J. 445, 627 A.2d 1149 (1993); *Hirsh v. City of Atlanta*, 261 Ga. 22, 401 S.E.2d 530 (citing *Grace*), *cert. denied*, 111 S. Ct. 2836, 112 S. Ct. 75 (1991); *Planned Parenthood Shasta-Diablo, Inc. v. Williams*, 18 Cal. App. 4th 359, 16 Cal. Rptr. 2d 540 (citing *Perry*), *review granted*, 851 P.2d 774, 19 Cal. Rptr. 2d 492 (Cal. 1993); *Horizon Health Center v. Felicissimo*, 263 N.J. Super. 200, 622 A.2d 891 (App. Div.) (citing *Perry*), *certif. granted*, 634 A.2d 527 (N.J. 1993).

Three federal circuits have fallen into this same error. *See Portland Feminist Women's Health Center v. Advocates for Life, Inc.*, 859 F.2d 681 (9th Cir. 1988) (citing *Grayned*, *Grace*); *New York State NOW v. Terry*, 886 F.2d 1339 (2d Cir. 1989) (citing *Clark*, *Heffron*, *Grayned*), *cert. denied*, 495 U.S. 947 (1990); *Northeast Women's Center, Inc. v. McMonagle*, 939 F.2d 57 (3d Cir. 1991) (relying on *Portland Feminist* and *New York State NOW* and citing *Clark* and *Frisby v. Schultz*, 487 U.S. 474 (1988)).

To their credit, other federal circuits have declined to condone the injunctive formulation of "time, place, and manner" regulations on expressive activity. *See Cheffer v. McGregor*, 6 F.3d 705 (11th Cir. 1993); *Mississippi Women's Medical Clinic v. McMillan*, 866 F.2d 788 (5th Cir. 1989); *National Organization for Women v. Operation Rescue*, 914 F.2d 582 (4th Cir. 1990) (per curiam), *rev'd on other grounds sub nom. Bray v. Alexandria Women's Health Clinic*, 113 S. Ct. 753 (1993). (For that matter, the Second Circuit's decision in *New York State NOW* recognized the need to limit the injunction to unlawful conduct, as opposed to expressive activities on public sidewalks. 886 F.2d at 1363. Hence, the court's invocation of the "time, place, and manner" test was unnecessary.)

[8] The Bureau of National Affairs seems to think so. In its publication, "The United States Law Week," BNA routinely lists under the subject heading "Health Care" any case arising out of anti-abortion protests, regardless of what the actual legal issues are. *E.g.*, 61 U.S.L.W. 4069 (Jan. 12, 1993) (listing *Bray v. Alexandria Women's Health Clinic*, 113 S. Ct. 753 (1993), under "Health Care - Abortion" while central issue was Civil Rights Act of 1871); 62 U.S.L.W. 4073 (Jan. 25, 1994) (listing *National Organization for Women v. Scheidler*, 114 S. Ct. 798 (1994), under "Health Care - Abortion" while central issue was RICO); 62 U.S.L.W. 3485 (Jan. 25, 1994) (listing the present case under "Health Care"). The implicit rationale is that "abortion cases," broadly defined, are a law unto themselves.

The Florida Supreme Court, following the same routine, simply cited *Perry* as its authority for using the "time, place, and manner" test, Pet. App. A-14, despite the fact that *Perry* was not an injunction case.

2. *Lower courts have confused prior restraints with content-based restrictions.*

The court below also committed a basic definitional error by confining the doctrine of prior restraint to "content-based restrictions," Pet. App. A-19. This definitional error reflects recent lower court decisions muddling the category of prior restraints with the separate category of content-based restrictions.

This conflation of the *type* of restriction (prior restraint vs. subsequent punishment) with the *content-neutrality* (or lack thereof) of the restriction also apparently originates with the flawed decision in *Bering v. SHARE*. The *Bering* court took the truly bizarre position that a speech-restrictive injunction is *not* a prior restraint if it *is content-based*:

> the injunction ultimately obtained did not suppress speech 'of any kind,' but rather particular words . . . . In short, this is not the classic prior restraint described in *Near* [*v. Minnesota ex rel. Olson*] or [*Organization for a Better Austin v.*] *Keefe*, and the doctrine of prior restraint should not be applied to this case.

106 Wash. 2d at 235, 721 P.2d at 932. Not surprisingly, no other court has embraced this absurd holding.

The Third Circuit, however, committed exactly the opposite error. In *Northeast Women's Center, Inc. v. McMonagle*, 939 F.2d 57 (3d Cir. 1991), the court flatly declared: "A prior restraint is a *content-based* restriction on speech prior to its occurrence," *id.* at 63 (emphasis added). The court cited no authority for this proposition, and for good reason: the proposition is demonstrably false. An injunction need not restrict the content of the enjoined expression in order to qualify as a prior restraint. In *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971), this Court struck down an injunction that forbade "passing out pamphlets, leaflets or literature *of any kind*, and from picketing," *id.* at 417 (emphasis added; quoting injunction), calling the order a "prior restraint," *id.* at 419. In *Carroll v. President of Princess Anne*, 393 U.S. 175 (1968), this Court struck down an injunction that forbade " 'holding rallies or meetings . . . which will tend to disturb and endanger the citizens of the County and . . . from using . . . any . . . sound making or producing device thereby disturbing the tranquility of the populace of the County,' " *id.* at 177 n.3 (quoting order); again, this Court analyzed the injunction as a prior restraint, *id.* at 181. For that matter, the licensing schemes this Court has condemned as prior restraints are typically blanket, facially content-neutral restrictions. *E.g., Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969) (permit for public demonstration); *Lovell v. Griffin*, 303 U.S. 444 (1938) (permit for literature distribution).

The court below simply cited and mouthed the erroneous statement of the Third Circuit in *Northeast Women's*.[9] The Third Circuit's erroneous *ipse dixit* has taken on a doctrinal life of its own.

[9] The court below also cited *Planned Parenthood League of Massachusetts v. Operation Rescue*, 406 Mass. 701, 550 N.E.2d 1361 (1990). *Planned Parenthood League*, however, does not endorse this particular error. Instead, *Planned Parenthood League* commits the more basic error, discussed *supra* § I(C)(1), of incorrectly asserting that a prior restraint need only satisfy the "time, place, and manner" test—one of the elements of which is content neutrality—in order to be constitutional. 406 Mass. at 716, 550 N.E.2d at 1370. To conclude from this that a content-neutral injunction is not a prior restraint is no more sensible than concluding that an injunction which furthers an important government interest is not a prior restraint.

This Court should repudiate—before it spreads any farther—the false notion that only content-based restrictions can qualify as prior restraints.

II. THE ANTI-SPEECH INJUNCTIVE RESTRICTIONS AT ISSUE ARE UNCONSTITUTIONAL PRIOR RESTRAINTS.

This Court has consistently "interpreted the First Amendment as providing greater protection from prior restraints than from subsequent punishments," *Alexander*, 113 S. Ct. at 2773 (citation omitted). "Any prior restraint on expression comes to this Court with a 'heavy presumption' against its constitutional validity." *Keefe*, 402 U.S. at 419 (and cases cited). "Respondent[s] thus carr[y] a heavy burden of showing justification for the imposition of such a restraint." *Id.* "In order to be held lawful, [a prior restraint], first, must fit within one of the narrowly defined exceptions to the prohibition against prior restraints, and, second, must have been accomplished with procedural safeguards that reduce the danger of suppressing constitutionally protected speech." *Southeastern Promotions*, 420 U.S. at 559.

Respondents have failed to carry this heavy burden in the present case.

A. Anti-abortion Speech Does Not Fall Within the Narrowly Defined Exceptions to the Prior Restraint Doctrine.

The speech of pro-life picketers and sidewalk counselors can entail a broad variety of expressions—everything

from silent witness, to polite offers of information, to urgent entreaties, to pointed criticisms, to emotional exclamations. Such speech, however characterized, cannot be relegated wholesale to the forbidden categories of obscenity or "fighting words." On the contrary, pro-life speech "is entitled to the fullest possible measure of constitutional protection," *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 816 (1984) (listing, as example, "Abortion is Murder"). Hence, no exception to the prior restraint doctrine can justify the injunctive restrictions at issue.

B. No Countervailing Interest Can Justify the Drastic Measure of a Prior Restraint in This Case.

Moreover, this case presents no extraordinary, overriding need to suppress speech.

In *Keefe*, this Court held that a private citizen's allegations of coercion, intimidation, and invasion of residential privacy were insufficient to justify a prior restraint. In *Nebraska Press Association*, this Court found a private citizen's competing constitutional right to a fair trial under the Sixth Amendment insufficient to justify a prior restraint. In *New York Times v. United States*, this Court held that even national security interests fell short of justifying a prior restraint. *A fortiori*, the prior restraint in this case—which seeks only to prevent alleged "harassment"—is plainly unconstitutional.

C. The Injunction Is Not Confined to Otherwise Unlawful Conduct Much Less Serious Illegality or Violence.

In the context of protected expressive activities, such as picketing, leafletting, and pure verbal communication, a court may "restrain *only unlawful conduct* and persons responsible for conduct of that character." *NAACP v.*

Claiborne Hardware Co., 458 U.S. 886, 924 n.67 (1982) (emphasis added).[10] In short,

> An order issued in the area of First Amendment rights must be couched in the narrowest terms that will accomplish the pin-pointed objective permitted by constitutional mandate and the essential needs of public order. . . . In other words, the order must be tailored as precisely as possible to the exact needs of the case.

Carroll, 393 U.S. at 183-84.

It follows that injunctive provisions which restrict peaceful, public expression in traditional public forum property violate the doctrine of prior restraints. Rather

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[10] In *Claiborne Hardware*, this Court reviewed a state court order imposing damages and an injunction against numerous civil rights activists. This Court reversed, pointing out that the activists' behavior included both "elements of criminality and elements of majesty." *Id.* at 888. Justice Stevens, writing for the Court, emphasized the need to separate out lawful and unlawful activities before imposing remedial sanctions:

> No federal rule of law restricts a State from imposing tort liability for business losses that are caused by violence and by threats of violence. When such conduct occurs in the context of constitutionally protected activity, however, 'precision of regulation' is demanded. . . . Specifically, *the presence of activity protected by the First Amendment imposes restraints on the grounds that may give rise to damages liability and on the persons who may be held accountable for those damages.*

Id. at 916-17 (emphasis added and citation omitted). The "importance of avoiding the imposition of punishment for constitutionally protected activity," *id.* at 934, required this Court to reverse the sweeping imposition of damages liability.

"For the same reasons," the Court continued, "the permanent injunction" imposed against the activists "must be dissolved." *Id.* at 924 n.67. This Court declared that the lower court, on remand, "may wish to vacate the entire injunction" if the facts indicated that the order was "no longer necessary"; at a minimum, however, "the injunction *must* be modified to restrain *only unlawful conduct* and the persons responsible for conduct of that character," *id.* (emphasis added).

than limit itself to unlawful activities, such as blockading or trespass, the injunction in this case bans a broad range of peaceful expressive activity, including picketing, leafletting, and even mere conversation.

Therefore the speech-restrictive portions of the amended permanent injunction, i.e., ¶¶ 3-6, 9 (Pet. App. B-7 to 9), are unconstitutional prior restraints on speech.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the Supreme Court of Florida.

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No. 93-880

In The

Supreme Court of the United States

October Term, 1993

JUDY MADSEN, ED MARTIN, AND SHIRLEY HOBBS,
Petitioners,

v.

WOMEN'S HEALTH CENTER, INC.,
AWARE WOMEN CENTER FOR CHOICE, INC.,
EPOC CLINIC, INC., AND CENTRAL FLORIDA
WOMEN'S HEALTH ORGANIZATION, INC.,
Respondents.

On Writ of Certiorari to the
Supreme Court of Florida

BRIEF AMICUS CURIAE OF NATIONAL RIGHT TO LIFE COMMITTEE, INC. IN SUPPORT OF PETITIONERS

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QUESTIONS DEALT WITH HEREIN

Whether special rules of law should be rejected in abortion-related cases so that:

(1) the standing of private parties to assert governmental interests in law suits between purely private parties is not recognized; and

(2) private parties are not permitted to assert constitutional rights against nongovernmental action.

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BRIEF AMICUS CURIAE OF NATIONAL RIGHT TO LIFE COMMITTEE, INC. IN SUPPORT OF PETITIONERS

INTEREST OF AMICUS CURIAE[1]

The National Right to Life Committee, Inc. is a nonprofit organization whose purpose is to promote respect for the worth and dignity of all human life, including the life of the unborn child from the moment of conception. The National Right to Life Committee, Inc. is comprised of a Board of Directors representing 51 state affiliate organizations and about 3,000 local chapters made up of individuals from every race, denomination, ethnic background, and political belief. It engages in various lawful political, legislative, legal, and educational activities to protect and promote the concept of the sanctity of innocent human life.

The members of the National Right to Life Committee, Inc. have been the primary promoters of laws restricting abortion to only those instances in which the mother's life is in danger. Since *Roe v. Wade*, 410 U.S. 113 (1973), and *Doe v. Bolton*, 410 U.S. 179 (1973), the members of the National Right to Life Committee, Inc. have supported legislation to protect unborn human life within the limits set by those decisions and have sought, through lawful means, those changes in the law which would allow full legal protection for the unborn. The National Right to Life Committee, Inc. seeks to advance its interests by addressing the legal issues herein.

[1]This brief is filed with permission of all the parties. A letter granting the consent of both the Petitioners and the Respondents "to the filing of any and all amici briefs in support of the Petitioners" has been filed with the Clerk of this Court by Counsel for the parties. A courtesy photocopy of said letter has been supplied to the Clerk of this Court contemporaneously with the filing of this brief.

SUMMARY OF THE ARGUMENT

While the National Right to Life Committee, Inc. has adopted a policy against engaging in illegal activities in opposition to abortion, the injunction in this case sweeps up constitutionally-protected free expression and assembly rights in a public forum along with activity unlawful under Florida law. The National Right to Life Committee, Inc. seeks to protect the right of abortion rights opponents to engage in peaceful expression activities, including picketing, handbilling, and solicitation in any public forum, including the sidewalks around abortion facilities. In the past, abortion has worked a distortion wherever it touched on the law, as abortion was made into a super-protected right. Your amicus notes an encouraging trend toward applying legal rules uniformly in abortion cases as in other cases. In the present case your amicus prays the Court to continue this trend by (1) denying standing to the private-party Respondents to assert governmental interests in support of their position and (2) rejecting the effort to support an injunction against private action by asserting constitutional rights, which only protect against state action.

ARGUMENT

The National Right to Life Committee, Inc. ("NRLC") has formally adopted a policy which prohibits its officers, employees, members, and affiliated organizations from participating in or promoting illegal activity in opposition to abortion. The Florida injunction at issue in this case sweeps extremely broadly, reaching not only illegal activity but expressive activity which is protected by the First Amendment to the United States Constitution. For example, the injunction places a constitutionally unjustified prior restraint on peaceful picketing, literature distribution, and in-person communication conducted in a traditional public forum done by supporters of only one side in the abortion debate. It is infringement of this constitutionally-protected activity which NRLC opposes in the present brief.

In seeking to protect constitutionally-guaranteed free expression, National Right to Life Committee, Inc. is particularly concerned: in general, (1) that special rules of law not be applied in abortion cases, and, specifically, (2) that private parties not be allowed to assert state interests on their own behalf, and (3) that the right to abortion not be subject to special protection against private actions but be recognized as a right solely against state action. These issues are the subject of this brief.

I. Normal Rules of Jurisprudence Should Govern This Abortion Case.

Roe v. Wade, 410 U.S. 113, was intended to settle the issue of abortion in American law. That the present case is before the Court demonstrates that *Roe* did not settle the abortion issue. Rather, *Roe* has proven to be inherently difficult to apply in any consistent and principled manner. In fact, in the recent case of *Planned Parenthood of S.E. Pennsylvania v. Casey*, 112 S. Ct. 2791 (1992), three members of this Court created a new controlling analysis for abortion jurisprudence, the "undue burden" test, *id.* at 2803 (O'Connor, Kennedy & Souter joint opinion), rejecting the analysis originally created by *Roe*.

In the past, rigid and expansive application of *Roe* has worked a distortion on the normal functioning of the law wherever touched by abortion. This abortion distortion effect has been evident in several areas, some of which are set forth below. Yet, as also noted herein, this Court has recently shown a willingness to move away from creating special rules of law in abortion cases. Your amicus urges the court to again, in this case, reject the past practice of treating abortion as a "super-protected" right, Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 Yale L.J. 920, 935 (1973), and apply normal rules of law to protect legitimate free expression guaranteed by the First Amendment.

A. *In Prior Cases, Rigid Adherence to an Expansive Interpretation of Roe Has Wrought a Distortion in the Normal Rules of Law.*

In the cases decided after *Roe v. Wade* up to the time of *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986), an expansive interpretation of *Roe* was employed to strike down even the most modest regulations of abortion. In the process, related areas of the law were warped from their normal development patterns. Some of the results are briefly cataloged below. Another discussion, regarding the issue of standing, is discussed in the context of Section II, *infra*. The purpose of this discussion is to highlight how easily the Court in the past has slipped into a special-protection mode with regard to abortion and to urge the Court in this case to follow its more recent trend of applying the rules of law more uniformally and neutrally to abortion-related cases.

1. *Roe* Has Confused the Law Protecting the Unborn in Non-Abortion Contexts.

One of the areas in which the abortion distortion effect is most evident is in the law designed to protect preborn human beings in non-abortion contexts. In these areas, *Roe* poses a direct obstacle to the realization of important objectives embodied in laws which recognize and protect unborn human life, in that it has inhibited development of the law in these areas. However, where the abortion choice is not the issue, many courts have rejected the *Roe* rationale. Examples include the rights of the unborn in tort law, in wrongful death actions, in equity, in criminal law, and in laws relating to respect. *See* Bopp & Coleson, *The Right to Abortion: Anomalous, Absolute, and Ripe for Reversal*, 3 B.Y.U. J. Public Law 246-83 (1989) (discussing the abortion distortion effect of *Roe* on fetal rights in non-abortion contexts). A few examples are provided below.

a. Tort Law

The development of the law in the area of torts reveals the dramatic change in the legal protection of the rights of unborn human beings with the progress of scientific knowledge about the fact that each unique, individual human being comes into being at the moment of conception.

The first American case which dealt with fetal injury was the celebrated opinion by Judge Oliver Wendell Holmes, Jr. in *Dietrich v. Northampton*, 138 Mass. 14 (1884). Holmes interpreted the Massachusetts wrongful death act to preclude recovery for the death of a four to five month old fetus.[2] He held that "the unborn child was a part of the mother at the time of the injury" and that "any damage to [the fetus] which was not too remote to be recovered for at all was recoverable by her." *Id.* at 17.

Dietrich was followed until 1946, when, in the words of William Prosser, there occurred "the most spectacular [and] abrupt reversal of a well settled rule in the whole history of the law of torts." W. Prosser, *Handbook on the Law of Torts* 336 (4th ed. 1971). In *Bonbrest v. Kotz*, 65 F. Supp. 138 (D.D.C 1946), a federal court allowed the plaintiff infant to recover for injuries sustained when he was negligently taken as a viable fetus, from his mother's womb by the defendant doctor. *Id.* at 143. The *Bonbrest* court reasoned:

> As to the viable child being "part" of its mother-this argument seems to me to be a contradiction in terms. True, it is in the womb, but it is capable now of extrauterine life — and while dependent for its continued development on sustenance derived from its peculiar relationship to its mother, it is not a "part" of the mother in the sense of a constituent element — as that term is generally understood. Modern

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[2]The fetus lived for "ten or fifteen minutes" after premature birth, 138 Mass. at 15. Nevertheless, the court referred to the newborn as an "unborn child." *Id.* at 17.

> medicine is replete with cases of living children being taken from dead mothers. Indeed, apart from viability, a non-viable foetus is not a part of its mother.

Id. at 140.

Since *Bonbrest*, every state has recognized prenatal harm as a legitimate cause of action for a child subsequently born. *Prosser and Keeton on the Law of Torts* 368 (W. Keeton ed. 5th ed. 1984). Some states limit recovery to post-viability injuries (some doubtless influenced by *Roe*), but the clear trend is toward recovery for all prenatal harm. *Prosser and Keeton*, *supra*, at 368-69; Note, *The Law and the Unborn Child: The Legal and Logical Inconsistencies*, 46 Notre Dame L. Rev. 349, 357 (1970). The first court to abandon the viability standard declared what ought to be the guiding principle for all courts: "[L]egal separability should begin where there is biological separability." *Kelly v. Gregory*, 282 A.D. 542, 543, 125 N.Y.S.2d 696, 697 (1953). The court noted that it was the knowledge derived from medical science which powered the engine for change. *Id.* at 543-44, 125 N.Y.S.2d at 697-98. Yet despite the recognition of the rights of the unborn in this area, *Roe* has constrained the full development of the law protecting the unborn, as shown in the following examples.

b. Wrongful Death

A majority of jurisdictions now recognize a wrongful death cause of action for the death of a preborn human being — some rejecting the action unless the child is born alive and then dies and some allowing only post-viability actions. *Roe* has been cited by courts rejecting wrongful death actions for preborn humans[3] and by courts limiting the cause of action to viable

[3]*See, e.g., Justus v. Atchison*, 19 Cal. 3d 564, 565 P.2d 122, 139 Cal. Rptr. 97 (1977) (en banc); *Hernandez v. Garwood*, 390 So. 2d 357 (Fla. 1980); *Hogan v. McDaniel*, 204 Tenn. 253, 559 S.W.2d 774 (Tenn. 1977).

unborn children.[4] *Roe*'s viability line makes no more sense in wrongful death actions than it made in *Roe*, but *Roe*'s pernicious effect on this part of the law is clear.

c. Wrongful Birth

Roe v. Wade has even been used by courts recognizing wrongful birth claims, wherein parents seek damages for the birth of a "defective" child whom they would have aborted if they had been apprised of the defect. As of September 1988, seventeen state courts of appeal had recognized a wrongful birth claim. Bopp, Bostrom & McKinney, *The "Rights" and "Wrongs" of Wrongful Birth and Wrongful Life: A Jurisprudential Analysis of Birth Related Torts*, 27 Duq. L. Rev. 461, 462 (1989).

d. Homicide

Following the English statutory and common law pattern, early nineteenth century American law prohibited feticide by statutes which also encompassed abortion and, in some cases, by common law. *See* Destro, *Abortion and the Constitution: The Need for a Life-Protective Amendment*, 63 Cal. L. Rev. 1250, 1273-82 (1975). For example, New York in 1828 made it a felony to willfully cause the death of a fetus even before quickening. J. Mohr, *Abortion in America: The Origins and Evolution of National Policy, 1800-1900* 26-27 (1978) (citing N.Y. Rev. Stat. pt. IV, ch. I, tit. II, §§8, 9 at 550). When *Roe v. Wade* swept away the state abortion statutes the protection provided the unborn from homicide was also swept away.

Roe has had a detrimental effect on the states' efforts to protect the unborn from homicide outside the abortion context.

[4]*See, e.g., Toth v. Gorve*, 65 Mich. App. 296, 237 N.W.2d 297 (1975); *Wallace v. Wallace*, 120 N.H. 675, 421 A.2d 134 (1980) ("We remark also in passing that it would be incongruous for a mother to have a federal constitutional right to deliberately destroy a nonviable fetus, Roe v. Wade [citation omitted], and at the same time for a third person to be subject to liability to the fetus for his unintended but merely negligent acts."); *Werling v. Sandy*, 17 Ohio St. 3d 45, 476 N.E.2d 1053 (1985).

For example, the California Supreme Court overturned a murder indictment brought against a man for killing an unborn child by kneeing his ex-wife's abdomen, saying, "I'm going to stomp it out of you." *Keeler v. Superior Court*, 2 Cal. 3d 619, 470 P.2d 617, 87 Cal. Rptr. 481 (1970) (en banc), by applying the archaic born-alive rule. When the California legislature promptly redefined the homicide statute to expressly include the killing of a fetus, a California appellate court declared that *Roe* had removed the protection of a non-viable fetus because "as a matter of constitutional law the destruction of a non-viable fetus is not a taking of human life." *People v. Smith*, 59 Cal. App. 3d 751, 755, 129 Cal. Rptr. 498, 502 (1976). Following the California courts and *Roe*, many states have held that *Roe* denies the protection of homicide laws to the unborn.[5] This anomalous result further shows *Roe*'s distorting effect on the law.

2. *Roe* Has Distorted the Law Regarding Rules of General Application.

Roe v. Wade also set procedural precedents for distortion of common rules of adjudication. *See* Bopp & Coleson, *The Right to Abortion: Anomalous, Absolute, and Ripe for Reversal*, 3 B.Y.U. J. Pub. L. at 299-350. This was especially evident in *Thornburgh*, 476 U.S. 747, the high-water mark of *Roe*'s analysis. Some examples follow.

a. Statutory Construction

The abortion distortion factor was at work in the *Thornburgh* decision where this Court ignored the principle that a court should avoid constitutional problems by giving a statute a constitutional construction where fairly possible. The Pennsylvania law at issue in *Thornburgh* required a second physician to be present at post-viability abortions to care for the possibly surviving child. 18 Pa. Cons. Stat. Ann. §3210(c) (Purdon

[5] *See, e.g., State v. Gyles*, 313 So. 2d 799 (La. 1975); *State v. Brown*, 378 So. 2d 916 (La. 1979); *State v. Soto*, 378 N.W.2d 625 (Minn. 1985); *Hollis v. Commonwealth*, 652 S.W.2d 61 (Ky. 1983).

1983). For emergency purposes, the law provided that it is "a complete defense to any charge brought against a physician for violating the requirements of this section that he had concluded in good faith, in his best medical judgment, . . . that the abortion was necessary to preserve maternal life or health." *Id.* Although in *Planned Parenthood Ass'n of Kansas City, Missouri v. Ashcroft*, 462 U.S. 476, 482-86 (1983), this Court construed a similar second-physician provision to include an emergency provision for the life or health of the mother — even though none existed — this Court could not bring itself to do so in the Pennsylvania case and struck down the statute. *Thornburgh*, 476 U.S. at 771.

Justice White took the *Thornburgh* majority members to task for their willingness to disregard this principle of statutory construction:

> The Court's rejection of a perfectly plausible reading of the statute flies in the face of the principle — which until today I had thought applicable to abortion statutes as well as to other legislative enactments — that '[w]here fairly possible, courts should construe a statute to avoid a danger of unconstitutionality.' *Planned Parenthood Ass'n v. Ashcroft* [citation omitted]. The Court's reading is obviously based on an entirely different principle: that in cases involving abortion, a permissible reading of a statute is to be avoided at all costs.

Thornburgh, 476 U.S. at 812 (White, J., dissenting). *See* Bopp & Coleson, *The Right to Abortion*, *supra*, at 315-32 (extended discussion of abuse of the above principle in abortion cases).

b. Evidentiary Standards Applicable to Preliminary Injunction Hearings

Another example of the abortion distortion effect at work is also found in *Thornburgh*, where this Court rushed to a judgment on the merits from the appeal of a grant of a preliminary injunction. Shortly before the statute at issue in *Thornburgh* was to go into effect (but four months after the statute had been enacted), the plaintiff abortion providers filed forty affidavits,

which became the basis of a court-ordered stipulation, and requested a preliminary injunction. Pennsylvania was not allowed to contest Plaintiffs' facts unless it could give evidence at the hearing on the preliminary injunction. Because of the limited time available, no evidence was submitted by the state. Brief for Appellant at 35-49, *Thornburgh*, 476 U.S. 747. The parties were assured that the stipulation would be used solely for the purpose of the hearing. *Id.*

However, on appeal, the appellate court went to the merits and held the Pennsylvania abortion law largely unconstitutional. *Id.* at 8. The *Thornburgh* Court followed suit. In dissent, Justice O'Connor noted the abortion distortion effect at work in these words: "If this case did not involve state regulation of abortion, it may be doubted that the Court would entertain, let alone adopt, such a departure from its precedents."

B. *In Recent Cases, This Court Has Increasingly Rejected The Abortion Distortion of the Normal Rules of Law.*

In recent years, the Court has shown more of a willingness to uphold minimal abortion regulations, beginning to return to the notion that the right to abortion is not an absolute right which overrides all other rights and rejecting the notion that all the rules must be bent to achieve the triumph of the abortion right. This is evident beginning in *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989) (upholding state ban on use of public facilities and employees to perform or assist with most abortions) and extending to the cases of *Hodgson v. Minnesota*, 110 S. Ct. 2926 (1990) (upholding two-parent notification with judicial by-pass for minors seeking abortion); *Ohio v. Akron Center for Reproductive Health*, 110 S. Ct. 2972 (1990) (upholding parental notice for minors with judicial by-pass); *Rust v. Sullivan*, 111 S. Ct. 1759 (1991) (upholding federal regulations barring Title X programs from counseling or referring for abortion); and *Planned Parenthood of S.E. Pennsylvania v. Casey*, 112 S. Ct. 2791 (1992) (upholding

informed consent requirements and a 24-hour waiting period similar to those struck down in earlier cases decided by this Court).

The case of *Bray v. Alexandria Women's Health Clinic*, 113 S. Ct. 753 (1993), is a recent example of this Court's unwillingness to stretch the law to accommodate the desires of abortion rights partisans. *Bray* is on point with the case at bar in its holdings that abortion is a right protected only against governmental interference, *id.* at 762, 764, so will be discussed at length *infra*. For the present, it may be said that *Bray* represents a part of the post-*Thornburgh* departure from the old abortion-distortion approach to the law.

However, from the decision of the Florida Supeme Court in the case at bar, it is evident that this change has not affected all other courts. Your amicus respectfully requests this Court to follow its recent pattern and apply the rules of law neutrally in the present case as well. Two areas of special concern are discussed below.

II. Private Parties Do Not Have Standing to Assert Governmental Interests in Support of Their Position.

The subject of standing is another area in which the abortion distortion effect has been evident in the past. *Roe v. Wade* set forth the requirements of justiciability and standing. *Roe*, 410 U.S. at 123. A party must "establish[] that personal stake in the outcome of the controversy that ensures that the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution." *Id.* (citations and internal quotation marks omitted). The *Roe* Court decided that Jane Roe had standing and her case was not moot, *id.* at 125, despite the observation of then-Justice Rehnquist that there was nothing in the record to indicate that Roe was in her first trimester at any time "during the pendency of her lawsuit." *Id.* at 171 (Rehnquist, J., dissenting). Since Roe could have been in the last trimester of preg-

nancy when her complaint against the Texas abortion statute was filed, and *Roe* held that the state could proscribe abortion after viability (absent a threat to the life or health of the mother, which was not alleged), Jane Roe may never have had standing. *Id.*

Justice Rehnquist observed that the failure to abide by normal standing rules in *Roe* resulted in a "hypothetical lawsuit," *id.* at 172, which was used as a "fulcrum," *id.* at 171, to remove any significant regulation of abortion from the first trimester. *Id.* at 171-72. By so doing, Justice Rehnquist noted, "the Court depart[ed] from the longstanding admonition that it should never 'formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.'" *Id.* at 172.

The procedural laxity in *Roe* and subsequent abortion case was criticized by dissenters, *Roe*, 410 U.S. at 172, and legal scholars, *see, e.g.*, Epstein, *Substantive Due Process by Any Other Name: The Abortion Cases*, 1973 SUP. CT. REV. 159. However, it became a procedural precedent for other courts to deal in a lax manner with standing in abortion cases. *See, e.g., Margaret v. Edwards*, 764 F.2d 994, 997 (5th Cir. 1986); *Planned Parenthood Ass'n v. Cincinnati*, 822 F.2d 1390, 1396 & n.4 (6th Cir. 1987). *See also* Bopp & Coleson, *The Right to Abortion: Anomalous, Absolute, and Ripe for Reversal*, 3 B.Y.U. J. Pub. L. at 299-350 (a broader discussion of the abortion distortion effect on procedural and adjudicatory principles). It is hoped that the Court's more neutral approach to abortion jurisprudence will be evidenced in its treatment of the standing issue in abortion-related cases.

In extending the usual rules of standing, this Court also extended jus tertii standing to abortionists to assert the rights of women seeking abortion, despite the potential conflict of interest and the fact that the usual rules of standing would not allow recognition of such standing. *Id.* at 306-15. In *Singleton v. Wulff*, 428 U.S. 106 (1976), a weak plurality was mustered with four justices favoring such jus tertii standing and one

concurring because the physicians involved already had standing of their own (while questioning the logic of the other four). *Id.* at 121-22 (Stevens, J., concurring). A strong four-member dissent was written by Justice Powell. *Id.* at 124 & n.3. Justice Blackmun wrote the plurality opinion and began by noting that "[f]ederal courts must hesitate before resolving a controversy . . . on the basis of the rights of third persons . . . ." *Id.* at 113.

While extended discussion of the rightness or wrongness of the decision in *Singleton* is unnecessary at present, the standard for allowing a party to assert the rights of third parties must be examined.[6] Justice Blackmun stated that there were two elements: (1) the relationship between the litigant and the third party must be such that the latter's "right is inextricably bound up with the activity the litigant wishes to pursue," *id.* at 114, and (2) "some genuine obstacle" must exist to prevent the third party from asserting its own right." *Id.* at 116.

Applying these factors to the case at bar, it is evident that the private party abortion clinics do not have jus tertii standing to assert the rights of the State of Florida or any other governmental entity. Nor should the Florida courts be able to justify a remedy for a private party, which impinges upon the constitutional free expression rights of citizens, by relying on governmental interests (1) which are not "inextricably bound up with" the performance of abortion business by the abortion clinics and (2) where there is no "genuine obstacle" preventing the State of Florida or any subdivision thereof from asserting its interests at issue in a statute or ordinance (or by intervening in this case). Rather, the Florida courts purport to be resolving a case between private parties. There is no basis, then, for interposing governmental interests in support of an injunction in favor of Respondents.

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[6]The abortion-facility Respondents herein also assert the rights of women seeking to use their services. As seen from this brief discussion and Justice Powell's dissent in *Singleton*, there is a weak foundation for this jus tertii assertion of the rights of others by the abortion facilities, too.

Despite the failure of the Respondents to meet the standing test for asserting third party governmental interests, in the case at bar, the Florida courts have followed a relaxed rule of standing by allowing private parties to assert governmental interests and by relying upon such interests as justification for the injunction at issue.

While ordinarily parties may assert only their own interests in a case, in the decision of the Florida Supreme Court appealed herein, that court considered a variety of governmental interests. The court argued that "[n]umerous government interests, all of which rise to the level of 'significant' or higher are apparent." *Appendix to Petition for Writ of Certiorari* (hereinafter "*Appendix*") at A-15. These were listed by the court as follows:

> Our state has a strong interest in protecting the constitutional rights, both state and federal, express and implied, of all Florida's citizens, including its women. A woman's freedom to seek lawful medical or counseling services in connection with her pregnancy constitutes a clear personal right under both our federal and state constitutions. See *Roe v. Wade*, 410 U.S. 113 (1973) [parallel citations omitted]; *In re T.W.*, 551 So. 2d 1186, 1193 (Fla. 1989). Our state also has strong interests in ensuring the public safety and order, in promoting the free flow of traffic on public streets and sidewalks, and in protecting property rights of all Florida's citizens.

Id.

The Florida Supreme Court also observed that this Court, in *Frisby v. Schultz*, 487 U.S. 474 (1988), upheld a city ordinance banning all residential picketing "not[ing] that 'the protection of residential privacy' constitutes 'a significant governmental interest.'" *Appendix* at A-15 (quoting *Frisby*, 487 U.S. at 484). The Florida Supreme Court further argued "that the reasoning underlying this government interest in residential privacy applies even more convincingly to the state interest in ensuring medical privacy." *Appendix* at A-16.

In response, it must first be noted that *Frisby* involved a duly-enacted ordinance and the City of Rockford was a party. In short, it was an example of *government* asserting governmental interests. Public safety, traffic flow, and similar interests are normally protected by legislative enactments (at whatever governmental level), in which appropriate legislative action is taken to assert these governmental interests. Private parties may not come into court to assert them.[7]

This observation highlights the problem with the actions of the Florida courts, namely, that this action arose as a conflict between private parties. No governmental entity was involved as a party in this case. Therefore, it was improper for a court to consider on behalf of private parties interests which only the government had standing to assert.

Your amicus recognizes that in order to justify infringement of free expression a state actor must demonstrate, *inter alia*, significant state interests to justify the infringement. For this reason, governmental interests are being argued in this case to attempt to justify the action of the state court in enjoining free speech. However, this ignores the posture of the case.

This case arose as a private action between two parties. Therefore, any invocation of governmental interests is done so on behalf of the abortion facilities who were Plaintiffs below and are Respondents herein.

When the trial court enjoined free speech, it became the state actor infringing on free speech, and the First Amend-

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[7]Similarly, the case of *Grayned v. City of Rockford*, 408 U.S. 104 (1972), on which the Florida Supreme Court relied, *Appendix* at A-22, was based on an ordinance banning noise disturbing to schools. Because there was a governmental actor, consideration of constitutional principles concerning free speech was appropriate (a subject dealt with in more detail *infra*) and consideration of state interests was appropriate. *Grayned* did not originate as a conflict between private parties, as has the case at bar. Therefore, the assertion that *Grayned* provides a justification for limiting free speech in the case at bar due to asserted state interests by a private party is erroneous.

ment analysis asks whether the state actor, *inter alia*, acted in furtherance of significant state interests. For the Florida courts then to affirm the action of the trial court on the basis of significant governmental interests is to create a bootstrap device to pull in governmental interests in favor of an action done on behalf of a private party (which could not assert those interests in its own behalf).

This is uniquely different from the usual situation where a legislative body passes a statute infringing upon free speech and the courts ask whether there were significant governmental interests to justify the infringement. In effect then, the assertion of governmental interests in this case is done both by and on behalf of the Respondent abortion facilities herein, which are solely private parties and not entitled to raise the rights of the third party State of Florida or its political subdivisions. Therefore, for the trial court to accept arguments about avoiding disruption of public services and to employ them as a basis for its injunction is to take into account interests not rightly before it because they were not the interests of any party. If the State of Florida or any city in the state was concerned about traffic flow and the like, it could enforce statutes already on the books. If there was truly a disruption of traffic flow (and the evidence showed little if any) as a result of free speech activity, the city was responsible to enforce its own ordinances and the remedy of the abortion facilities was to call the police and point out the problem. It was not the trial court's job to enforce city traffic ordinances — without the city even acting to assert its interest — by injunctive penalties at the behest of private parties without standing to raise the issues.

III. The Right to Abortion Is Protected from Governmental Action, So That the Right Is Not Subject to Special Protection Against Private Actions.

The Supreme Court of Florida in its assertion of interests sought to be protected in the case at bar also stated that:

> Our state has a strong interest in protecting the constitutional rights, both state and federal, express and implied, of all Florida's citizens, including its women. A woman's freedom to seek lawful medical or counseling services in connection with her pregnancy constitutes a clear personal right under both our federal and state constitutions. *See Roe v. Wade*, 410 U.S. 113 (1973) [parallel citations omitted]; *In re T.W.*, 551 So. 2d 1186, 1193 (Fla. 1989).

Appendix at A-15. While this is true, it ignores the fact that no governmental entity is a party in this case. This case is about a conflict between purely private parties. As a result, concerns over constitutional rights are irrelevant.

Constitutional rights protect persons against actions by government, not private parties. Therefore, if there is a constitutional right to abortion, it is a right which prohibits states from limiting that right in an unconstitutional fashion. It does not prevent private actors from limiting that right. While interference with constitutional rights may also generate legal claims under state law, the fact that one may have a constitutional right to engage in certain action in no way should heighten the state law rights of the one wronged.

This Court dealt recently with an effort by abortion rights activists to turn ordinary state cases into federal cases in *Bray v. Alexandria Women's Health Clinic*, 113 S. Ct. 753, and rejected the effort. In *Bray* the claim was made that the anti-conspiracy prohibitions of 42 U.S.C. § 1985(3) could be enlisted in the effort of abortion facility owners to prevent protest activities of certain abortion rights opponents. This Court rejected the effort, holding that:

> A § 1985(3) private conspiracy "for the purpose of depriving . . . any person or class of persons of the equal protection of the laws . . . ," requires an intent to deprive persons of a right guaranteed against private impairment. [Citations omitted.] No intent to deprive of such a right was established here.

Id. at 762. This Court held that there was no evidence of an intended violation of the right to travel interstate, *id.*, which is protected against private action. Neither was there a violation of the right to abortion because "deprivation of that federal right (whatever its contours) cannot be the object of a purely private conspiracy." *Id.* at 764. "The statute does not apply . . . to private conspiracies that are 'aimed at a right that is by definition a right only against state interference . . . .'" *Id.* This Court held that "[a]bortion is not among" the few rights protected against "private as well as official encroachment." *Id.*

This Court developed the thought further:

> It would be most peculiar to accord [abortion] that preferred position, since it is much less explicitly protected by the Constitution than, for example, the right of free speech rejected for such status in *Carpenters*. Moreover, the right to abortion has been described in our opinions as one element of a more general right of privacy, see *Roe v. Wade* [citations omitted], or of Fourteenth Amendment liberty, see *Planned Parenthood of Southeastern Pennsylvania* [citation omitted]; and the other elements of those more general rights are obviously not protected against private infringement.

Id.

Justice Scalia for the Court further observed that "[a] burglar does not violate the Fourth Amendment, for example, nor does the mugger violate the Fourteenth." *Id.* While in many situations where a legal wrong is done there would also be a constitutional right claim if the wrong were done by a state actor, that fact cannot be used to somehow heighten or justify the remedy available against the wrongdoer. However, such an effort has been made in the case at bar.

The Florida Supreme Court said: "We conclude that the reasoning underlying this government interest in residential privacy [in the *Frisby* case] applies even more convincingly to the state interest in ensuring *medical privacy.*" *Appendix* at

A-16 (emphasis added). In setting forth the authority for a woman's "medical privacy" right, i.e., her "freedom to seek lawful medical or counseling services in connection with her pregnancy" the Florida Supreme Court cited *Roe v. Wade* and *In re T.W.*, 551 So.2d 1186, 1193 (1989), both of which deal with constitutional rights. *Appendix* at A-15.

The Florida Supreme Court also wrote:

> This rule [in *Grayned v. City of Rockford*, 408 U.S. 104 (1972)] is particularly apt in the present case, where demonstrators' tactics have impaired the functioning not of a school but a licensed medical facility and have placed in jeopardy the health, safety, and *rights* of Florida women.

Id. at A-23 (emphasis added).

This right to "medical privacy" and these "rights of Florida women," which supposedly makes limitations on free speech even more appropriate with regard to abortion facilities than with regard to schools, are constitutional rights. Constitutional rights are only protected against governmental action. The rights asserted cannot in any way be relevant in the case at bar and ought not to be used in the context of an *a fortiori* argument in this case to enhance or justify the remedy available to the abortion facilities against those who would exercise their right to free speech which *ought* to be protected against infringement by a Florida court's injunction.

This Court has rejected the creation of speech-free zones in a number of contexts. These include such significant places as courthouses, *United States v. Grace*, 461 U.S. 171 (1983), schools, *Grayned*, 408 U.S. at 119 (peaceful sidewalk picketing may not be banned), embassies, *Boos v. Barry*, 485 U.S. 312, 333 (1988), businesses, *Thornhill v. Alabama*, 310 U.S. 88 (1940), and homes, *Frisby*, 487 U.S. 474 (only targeted, single-residence picketing may be banned). Peaceful picketing, handbilling, and solicitations at any of these sights may be disturbing to those within, but that is insufficient to override the First Amendment. Similarly, in the case at bar, the fact that women

at an abortion facility may also be exercising a constitutional right adds nothing to the equation to justify the limitation of other persons' constitutional rights, i.e., the rights of free expression. Persons in any of these other situations might be exercising their own constitutional rights, e.g., their own right of free expression. Yet, the First Amendment has no affect in the evaluation of legal wrongdoing and available remedies absent state action. Constitutional rights only protect against state action.

CONCLUSION

In conclusion, your amicus prays the Court to strike down the injunction at issue in this case as being an unconstitutional violation of the rights of Petitioners and others to engage in free assembly and expression as guaranteed by the First Amendment. The injunction is not protected from constitutional infirmity by governmental interests improperly considered by the lower courts nor by constitutional rights where there is no state action. The old pattern of creating special rules in abortion cases should be entirely abandoned and abortion should be treated like an ordinary constitutional right (if indeed there must be a right to abortion in this Court's jurisprudence), subject to the usual rules of procedure and principles of adjudication.

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In The

Supreme Court of the United States

October Term, 1993

JUDY MADSEN, SHIRLEY HOBBS and ED MARTIN,

Petitioners,

v.

WOMEN'S HEALTH CENTER, INC., *et al.*,

Respondents.

On Writ Of Certiorari
To The Supreme Court Of The State Of Florida

BRIEF OF AMICUS CURIAE AMERICAN FAMILY ASSOCIATION IN SUPPORT OF PETITIONERS

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CONSENT OF THE PARTIES

Attorneys for Petitioners and Respondents have consented to the filing of an amicus curiae brief by American Family Association. (Appendix A).

INTEREST OF AMICUS CURIAE

American Family Association ("AFA") is a not-for-profit corporation founded in 1987. AFA exists for the purpose of disseminating information and educational materials regarding traditional family values. Through its legal arm, the American Family Association Law Center, AFA participates in cases relating to First Amendment religious freedom and free speech issues, and to cases relating to the preservation of traditional moral values of American society. Amicus curiae American Family Association is not a party to this litigation.

SUMMARY OF ARGUMENT

This case raises a question of the conflict between an Amended Permanent Injunction (hereinafter the "Injunction"), entered April 8, 1993, by the Honorable Robert D. McGregor, Circuit Judge, in the Eighteenth Judicial Circuit of Florida against Petitioners, and the provisions of the First Amendment to the United States Constitution.

Specifically, the Injunction prohibits Petitioners, "and all persons acting in concert or participation with them, or on their behalf, with notice in any manner or means"

from *inter alia* "congregating, picketing, patrolling, demonstrating or entering that portion of the public right-of-way or private property within thirty-six (36) feet of the property line of the Clinic"; during specified hours "from singing, chanting, whistling, shouting, yelling, use of bullhorns, auto horns, sound amplification equipment or other sounds or images observable to or within earshot of the patients inside the clinic"; at all times "within three hundred (300) feet of the Clinic, from physically approaching any person seeking the services of the Clinic unless such person indicates a desire to communicate by approaching or inquiring of the Respondents . . . " in which case the communications of Petitioners are limited by the Injunction to "conversation of a non-threatening nature and by delivery of literature within the three hundred (300) foot area but in no event within the 36 foot buffer zone." The Injunction further prohibits persons, at any time, from "approaching, congregating, picketing, patrolling, demonstrating or using bullhorns or other sound amplification equipment within three hundred (300) feet of the residence of any of [the Clinics'] employees, staff, owners or agents . . . ".

Both the United States Court of Appeals for the Eleventh Circuit[1] and the Florida Supreme Court[2] have ruled on the subject Injunction, arriving at starkly contrasting results. Despite the fact that the Eleventh Circuit Court of Appeals had determined that the restriction imposed by

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[1] *Cheffer v. McGregor*, 6 F.3d 705 (11th Cir. 1993).

[2] *Operation Rescue v. Women's Health Ctr., Inc.*, 626 So.2d 664 (Fla. 1993).

the Injunction, in a traditional public forum, was a viewpoint based restriction on free speech, and thus was not sufficiently narrowly drawn to satisfy the constitutional tests applied by this Court, the Florida Supreme Court found the same wording to be content-neutral, and a valid regulation of the time, place and manner of speech.

This brief of amicus curiae is of limited focus. It addresses the fact that the interpretation of the Injunction by the Florida Supreme Court applied the incorrect standard of review to restrictions on speech in a traditional public forum, and failed to require that such a restriction be narrowly tailored in accordance with the principles enumerated by this Court. This brief does not address the other compelling legal arguments raised by Petitioners in their Opening Brief, or by other amici on behalf of Petitioners. It focuses only on the First Amendment issues raised by the requirement that such restrictions be narrowly tailored to achieve compelling state interests.

Because the decision of the Florida Supreme Court here under review failed to apply such standards or to require such narrow tailoring of restrictions, the decision of the Florida Supreme Court must be reversed.

ARGUMENT

I.

THE INJUNCTION FAILS TO DISTINGUISH BETWEEN LAWFUL AND UNLAWFUL EXPRESSIVE CONDUCT, AND IS NOT NARROWLY TAILORED TO THE PRECISE NEED OF THE CASE

A. The Injunction Converts a Traditional Public Forum Into a "First Amendment Free Zone"

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech. . . ."[3] The activities of Petitioners made subject to the Injunction, i.e., picketing, demonstrating, singing, chanting, whistling, shouting, yelling, and seeking to communicate with others, are, without question, expressive activities involving speech protected by the First Amendment. *United States v. Grace*, 461 U.S. 171 (1983); *Carey v. Brown*, 447 U.S. 455 (1980); *Gregory v. Chicago*, 394 U.S. 111 (1969); *United States v. O'Brien*, 391 U.S. 367 (1968); *Thornhill v. Alabama*, 310 U.S. 88 (1940).

> It is also true that "public places" historically associated with the free exercise of expressive activities, such as streets, sidewalks, and parks, are considered, without more, to be "public forums." [Citations omitted].
> *United States v. Grace*, 461 U.S. 171, 177 (1983).

In a "public forum", the government's ability to restrict expressive conduct is very limited. *Id.*

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[3] The full text of the First Amendment is set forth in Appendix B.

As the Court noted in *Grace*, property which falls in the category of a traditional public forum occupies a special position in terms of First Amendment protection. 461 U.S. at 180. "Sidewalks, of course, are among those areas of public property that traditionally have been held open to the public for expressive activities and are clearly within those areas of public property that may be considered, generally without further inquiry, to be public forum property." *Grace*, 461 U.S. at 179.

This Court has repeatedly recognized that peaceful expressive activities, such as those of Petitioners in communicating their views through demonstrations, picketing and the other forms of communication enumerated in the Injunction, are subject to the highest levels of First Amendment protection. Expression on public issues "has always rested on the highest rung of the hierarchy of First Amendment values." *Carey v. Brown*, 447 U.S. 455, 467 (1980). "[S]peech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964). This Court has repeatedly "recognized that the First Amendment reflects a single 'profound national commitment' to the principle that 'debate on public issues should be uninhibited, robust and wide-open'." *Boos v. Barry*, 485 U.S. 312, 318 (1988) (citations omitted). The Court has "consistently commented on the central importance of protecting speech on public issues." *Id.; see Connick v. Myers*, 461 U.S. 138, 145 (1983); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913, 926-27 (1982) (political speech lies "at the core of the First Amendment").

Moreover, "the Constitution protects expression and association without regard . . . to the truth, popularity, or

social utility of the ideas and beliefs offered." *NAACP v. Button*, 371 U.S. 415 (1963). "It is elementary, of course, that in a case of this kind the courts do not concern themselves with the truth or validity of the publication." *Organization For a Better Austin v. Keefe*, 402 U.S. 415 (1971).

Despite this Court's long history of upholding the cherished rights to free expression on significant issues of vital public importance, the Injunction in question, upheld by the Florida Supreme Court, seeks to transform the traditional public forum, where debate should be "uninhibited, robust and wide-open" to a forum in which all dissent is gagged and all but sympathetic communication is stifled.

By its terms, the Injunction creates two zones, free from First Amendment protected expression (the content of which is undesirable), around the abortion clinic of respondents, and additional zones around the residences of those affiliated with respondents.

Such an order, if upheld, turns more than two hundred years of First Amendment jurisprudence on its head. Rather than encouraging open and robust debate in the public square, it requires public speech to be kept from the public square. Rather than encouraging open, vigorous and robust debate, the Injunction requires dissenters to keep their thoughts to themselves. Rather than the government zealously protecting against abridgment of freedom of speech, the Injunction protects freedom *from* speech.

B. The History of Our Nation Includes Cherished Freedoms of Dissent by Protest

An important part of our national history is the right to protest societal wrongs through nonviolent protest. Such expression has served as an effective means of illustrating a moral witness within society against perceived injustices. *See generally* Martin Luther King, Jr., *Letter from Birmingham City Jail* (1963). In fact, advocates of the pro-choice industry, in their continuing efforts to persuade and lobby government through civil disobedience have also protested to the point of arrest to assert their views.[4] Examination of several important movements in this country's history, and of a highly effective, nonviolent contemporary movement, demonstrates the effectiveness of traditional civil obedience.

1. The Abolitionist Movement

In 1833, the American Anti-slavery Society resolved that its members would not resort to physical force or violence in order to vindicate the rights of those trapped in slavery. Throughout the early 1800's, the Abolitionists typically distributed newsletters advocating freedom for slaves, and they conducted organized campaigns to teach slaves how to read and write. Although the acts committed by the Abolitionists were crimes in the southern

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[4] Patricia Ireland, President of NOW, was arrested for her civil disobedience while protesting the Clinton administration's policy relating to lesbians and gays in the military service. *See* Cindy Loose, *Former Clinton Advisor Arrested in Gay-Rights Protest at White House*, Wash. Post, July 31, 1993, at A5.

states, the movement was largely nonviolent and directed to right a societal wrong which would have gone unchanged if voices of dissent were quieted. The Petitioners before this Court desire to publicly express their view that abortion is morally reprehensible. To quiet their voices simply because some segments of society disagree would merely abolish the very protection the First Amendment seeks to keep vitally alive within our society.

2. The Woman's Suffrage Movement

From its inception in the early 1870's, the Woman's Suffrage Movement was dedicated to obtaining voting rights for women in the United States. The Movement's activities were calculated to educate the public and included speeches, rallies, demonstrations, publications of a newspaper titled *The Revolution*, and distribution of leaflets and circulars.[5] As part of the Movement, some activists went beyond mere speech and engaged in activities of civil disobedience.

In 1917, some activists commenced an aggressive campaign of picketing the area around the White House to send the resident, President Wilson, as well as the nation, the message that women would not be denied the franchise. These protests led to their arrest on charges of "blocking traffic" and participating in an unlawful assembly.[6] In addition, the activists set illegal fires as "symbolic

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[5] *See* Eleanor Flexmer, *Century of Struggle* 149, 153 (1975).

[6] *Woman Arrests Suffrage Pickets* N.Y. Times, June 23, 1917, at 9.

watch fires for freedom" outside the White House lawn.[7] Moreover, several of the activists were arrested, along with Susan B. Anthony, when they attempted to register to vote in violation of the Act of May 31, which criminalized knowingly voting without having the right to vote. *See United States v. Anthony*, 24 F.Cas. 829 (C.C.N.D.N.Y. 1873).

3. Sit-ins and the Civil Rights Movement

The demonstrations of the '60's also included both expressive speech and acts of civil disobedience. Again, although some elements of the movement were involved with isolated violent acts, the theme of the movement was nonviolent civil disobedience to correct a societal wrong. Those engaging in lunch counter sit-ins did not use violence to compel restaurants to close.

The sit-ins were calculated to be nonviolent, and the activists went to extraordinary lengths to accomplish that result. The sit-ins at all-white lunch counters in the South began in February, 1960 in Greensboro, South Carolina, and participation in this highly visible and effective protest activity spread so rapidly that by October of that year there had been sit-ins in 112 southern cities.[8] At first disorganized, the sit-ins were soon being orchestrated by such groups as the Congress of Racial Equality and the Southern Christian Leadership Conference led by Dr.

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[7] Linda G. Ford, *Iran-Gerald Angels*, 236, 238 (1991).

[8] Juan Williams, *Eyes on the Prize* 140 (1987).

Martin Luther King, Jr. All of these organizations consistently advocated nonviolent civil disobedience to gain recognition for their movement. As such, the majority of the protesters, despite intense provocation by white segregationists,[9] followed the credo of nonviolence.

Indeed, many decisions of this Court noted the peaceful expression, even politeness, of the sit-in protests. *See Lombard v. Louisiana*, 373 U.S. 267, 268 (1963) (restaurant manager stated that protesters "did not cause any disturbance, . . . were orderly . . . "); *Peterson v. City of Greenville*, 373 U.S. 244, 247 (1963) ("[t]he manager and the police conceded that the petitioners were clean, well dressed, unoffensive in conduct, and that they sat quietly in the corner. . . . "); *Barr v. City of Columbia*, 378 U.S. 146, 150 (1964) (overturning a breach-of-peace conviction on the ground that "petitioners were polite, quiet, and peaceful from the time they entered the store to the time they left").

4. The Gay Rights Movement

As with the pro-life movement, gay rights activists have achieved their success in the last decade almost entirely through protected conduct – public education, and grass-roots political organizing to support or oppose

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[9] A student who participated in one such sit-in described an attack by white teenagers: "[they] stood in the aisles insulting us, blowing smoke in our faces, grinding out cigarette butts on our backs and finally pulling us off our stools and beating us. Those of us pulled off our seats tried to regain them as soon as possible, but none of us fought back in anger." Williams, *supra*, at 133 (citations omitted).

political candidates, legislation and referenda. The principal national organizations embodying the movement over the years have advocated seeking change, and have sought change, without advocating violence. Like all movements of civil disobedience, however, some elements within those organizations have perpetrated acts which would be considered unlawful and offensive to those in society.

Like the many movements of civil disobedience throughout our country's history, persons within our society also feel that abortion is morally reprehensible. For the First Amendment to fail now, society as a whole would fail and be disparaged rather than merely those within the pro-life movement. To snuff out speech merely because it is offensive to some, would be the first step in creating a government, and nation, which would no longer tolerate disagreeable speech. To penalize the Petitioners merely because of their beliefs, regardless of the peaceful conduct with other civil disobedience, would eviscerate this Court's long held tradition of First Amendment protection.

C. Narrow Tailoring of Remedy Requires Distinction Between Lawful and Unlawful Expressive Conduct

The Injunction purports to prohibit peaceful demonstrations, picketing, distribution of literature, prayer, counseling and other communicative activities within the "First Amendment Free Zones" which it creates. The

failure of the Injunction to distinguish between expressive conduct which is lawful and that which is unlawful[10] is a failure to narrowly tailor the remedy to protect the constitutional rights of Petitioners, and thus renders the Injunction unconstitutional.

This Court has unanimously held that "peaceful assembly for lawful discussion cannot be made a crime." *De Jonge v. Oregon*, 299 U.S. 353, 365 (1937). However, an injunction carries with it the possibility of arrest and attendant criminal penalties. Thus, criminalization of unpopular speech is precisely the effect of the Injunction at bar.

The speech of Petitioners serves to communicate their views on the important public issue of abortion, and to persuade those in the vicinity. This may (indeed Petitioners undoubtedly desire that it will) result in others taking action in response to the persuasive communications, such as changing their own views, and declining to obtain an abortion. However, the protected character of speech is not lost, simply because it may embarrass others or coerce them into action. *Claiborne Hardware*, 458 U.S. at 910.

> As Justice Rutledge, in describing the protection afforded by the First Amendment, explained: "It extends to more than abstract discussion, unrelated to action. The First Amendment is a charter for government, not for an institution of learning. 'Free trade in ideas' means free trade

[10] Or, as in *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982), to distinguish between expressive conduct which is violent, and that which is non-violent. 458 U.S. at 918.

> in the opportunity to persuade to action, not merely to describe facts." *Thomas v. Collins*, 323 U.S. 516, 537, 89 L.Ed. 430, 65 S.Ct. 315. *Claiborne Hardware*, 458 U.S. at 910.

Thus, the fact that the objective of Petitioners may be to persuade, even to persuade to action, does not divest the expressive conduct of its protected nature.

It may be arguable that some of the activities enjoined herein may be unlawful, although the Injunction does not so state, and the Florida Supreme Court makes only passing reference to the state's interest in assuring the public safety and order.[11] Under this Court's precedent, if all of the activities are lawful methods of communication, then the only valid restriction which this Court has ever permitted would be a reasonable time, place and manner restriction, content-neutral, and narrowly tailored to serve a significant government interest, leaving open ample alternative channels of communication. *United States v. Grace*, 461 U.S. 171, 177 (1983); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 915 (1982).

Even if it can be argued that some part of the activities enjoined herein are unlawful, the requirement of narrow tailoring of such a restriction compels a distinction between lawful and unlawful activities in the remedy fashioned by the court. As the Court has indicated in *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), in the context of protected expressive activities, courts may "restrain only unlawful conduct and the persons responsible for conduct of that character." *Id.* at 924, n. 67. The

[11] None of the enjoined activities are even alleged to be violent.

permissible scope of state remedies in the area of free speech coupled with conduct "is strictly confined to the direct consequences of such [violent] conduct and does not include consequences resulting from associated peaceful picketing or other . . . activity." *Id.* at 918, *quoting United Mine Workers v. Gibbs*, 383 U.S. at 729.

A comparison of the facts of *Claiborne Hardware* with the instant case is instructive. In *Claiborne Hardware*, injunctive relief was sought for interference with the business relationships of various merchants because of a boycott by members of the black community of businesses owned by whites. The economic boycott urged and carried out by civil rights leader Charles Evers, and his followers, involved "acts of *physical force* and *violence*" against customers of the white-owned businesses, "*[i]ntimidation, threats, social ostracism, vilification*, and . . . the *stationing of guards* in the vicinity of white-owned businesses," all of which resulted in black persons being compelled, against their will, to withhold their trade from the boycotted stores. 458 U.S. at 894-95 (emphasis added). The Court made reference to a finding of some ten incidents that "strikingly" revealed the "atmosphere of fear" which prevailed throughout the time frame. "In two cases, shots were fired at a house; in a third, a brick was thrown through a windshield; . . . ." 458 U.S. at 904. Other incidents involved shots being fired into a home, a fight, slashing of tires and threatening telephone calls. 458 U.S. at 905-06.

Notwithstanding the activities which this Court characterized as unlawful, the Court reversed the damages award and injunction, observing that the view that the unlawful portion of the expressive conduct justified the

judicial prohibition of all the expressive conduct "accords insufficient weight to the First Amendment's protection of political speech and association." 458 U.S. at 914-915. Thus, the Court found that the injunction "must be modified to restrain only unlawful conduct and the persons responsible for the conduct of that character." *Id.* at 924, n. 67.

In the instant case, the Florida Supreme Court made reference to the state interest in ensuring the public safety and order, and "specific abuses" identified in the injunction. The Florida Court also indicated that reliance upon *NAACP v. Claiborne Hardware Co.* was misplaced, since the sole issue then before this Court was damages. 626 So.2d at 675, n. 8. However, this reasoning is not only based on an erroneous understanding of *Claiborne Hardware*, but an inadequate analysis of the principles of free speech, as well. As indicated in *Claiborne Hardware*, this Court specifically addressed the injunctive relief of the Mississippi Chancery Court. *See, e.g.*, 458 U.S. 907-915, 924 and n. 67. In addition, while a damages claim may be appropriate in circumstances where speech is not protected, such as cases of defamation and the like, injunctive relief acts as a prior restraint, and is thus subject to a much higher standard of scrutiny. *Organization For a Better Austin v. Keefe*, 402 U.S. 415 (1971); *Near v. Minnesota*, 283 U.S. 697 (1931). Indeed, as the Court articulated in *Claiborne Hardware*:

> While a State legitimately may impose damages for the consequences of violent conduct, it may not award compensation for the consequences of nonviolent, protected activity. Only those losses proximately caused by unlawful conduct may be recovered.
> 458 U.S. at 918.

Because the "First Amendment Free Zones" established by the Injunction at bar draw no distinction between expressive conduct which is lawful or unlawful, violent or nonviolent, the Injunction is unconstitutional.

II.

THE INJUNCTION IS NOT NARROWLY TAILORED TO AVOID IMPERMISSIBLE RESTRICTIONS ON SPEECH

A. Under a Time, Place and Manner Analysis, The Injunction is Not Narrowly Tailored to Avoid Constitutional Conflicts

As set forth below, an analysis based upon time, place and manner should not be indiscriminately applied to substantive injunctions like the one at issue here. However, even under such an analysis, this Injunction should not be permitted to stand.

In the context of public places historically associated with the free exercise of expressive activities, such as streets, sidewalks and parks (i.e., "public forums"), "the government's ability to permissibly restrict expressive conduct is very limited: the government may enforce reasonable time, place, and manner regulations as long as the restrictions 'are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.' [Citations omitted]". *United States v. Grace*, 461 U.S. 171, 177 (1983). Restrictions which go further, such as an absolute prohibition on particular types of expression, will be upheld only if narrowly drawn to accomplish a compelling governmental interest. *Id.; Perry Education Assn. v. Perry Local*

Educators Assn., 460 U.S. 37, 46 (1983); *Widmar v. Vincent*, 454 U.S. 263 (1981).

The reasonableness of a time, place and manner restriction depends, significantly, upon the "nature of a place, the 'pattern of its normal activities' . . . . The crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time." *Grayned v. City of Rockford*, 408 U.S. 104, 116 (1972). *Grayned* involved a challenge to an anti-noise ordinance. While acknowledging that reasonable time, place and manner restrictions may apply to a city ordinance, the Court cautioned that such restrictions could not be applied to censor the speaker's message. Thus, access to public places for the purpose of exercising First Amendment rights could not broadly be denied. "Free expression 'must not, in the guise of regulation, be abridged or denied.' " *Id.* at 117.

Applying the Court's analysis from *Grayned* to the instant case, it becomes clear that enforcement of the injunctive First Amendment Free Zones against Petitioners' peaceful and quiet picketing, counseling, praying and demonstrating is not a *reasonable* restriction on the time, place or manner of expression.

Indeed, the terms of the Injunction in this case amount to a total ban on Petitioners' communicative activity within the First Amendment Free Zones created. An injunction "which totally bans the specified communicative activity . . . cannot be justified as a reasonable place restriction primarily because it has an insufficient nexus with any of the public interests . . . " upon which it is based. *Grace*, 461 U.S. at 181.

The Injunction, by its terms, indicates that the justification for the restrictions is the impact on traffic and noise, and the asserted interference with a woman's freedom to seek medical services in connection with aborting her child, as well as insuring the public safety and order. 626 So.2d at 672.

As this Court stated in *Grace*:

> We do not denigrate the necessity to protect persons and property or to maintain proper order and decorum . . . , but we do question whether a total ban [on the methods of communication] substantially serves these purposes. 461 U.S. at 182.

As in *Grace*, there is no suggestion here, for example, that Petitioners, themselves, obstructed the public sidewalks or access to the property, threatened injury to any person or property, or in any way interfered with the orderly administration of the property. "A total ban on the specified conduct is no more necessary for the maintenance of peace and tranquility on the subject property than on any other public property in the city." 461 U.S. at 182.

B. A Substantive Injunction Must Be Narrowly Drawn to Avoid Violation of the Separation of Powers Doctrine

The decisions of this Court have reflected a great reluctance to uphold an injunction imposing substantive restrictions on expressive activity. Indeed, the Court's decisions permitting restriction on the basis of time, place

and manner analysis appear to have involved only statutes, ordinances and regulations. *See, e.g., Cox v. Louisiana*, 379 U.S. 559 (1965) (statute); *Frisby v. Schultz*, 487 U.S. 474 (1988) (ordinance); *Clark v. Community For Creative Non-Violence*, 468 U.S. 288 (1984) (regulations). The decisions of this Court reflect several reasons for disfavoring the use of substantive injunctions against free speech. These considerations reflect the wisdom of preserving the constitutional distinction between the lawmaking role of elected bodies and the adjudicative role of courts.[12]

First, a statute or ordinance applies uniformly, while an injunction imposes special legal restrictions only upon a particular group of people. The injunctive creation of substantive offenses therefore inherently results in unequal legal treatment. That is, even if an injunction is content-neutral, it relates only to communicative activities as to a particular subject matter or location. Those engaging in precisely the same activity at a different location, or engaging in different activities at the same location are not subject to an injunction, although they would be subject to a statute or ordinance with exactly the same provisions.

Second, those alleged to have violated an ordinance retain the full panoply of due process rights and substantive defenses. Those alleged to have violated an injunction, by contrast, face summary contempt proceedings with virtually no opportunity to challenge the underlying restrictions or raise any defense other than denial of the

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[12] U.S. Const., Art. I, Sec. 1.

alleged acts. *E.g., Walker v. Birmingham,* 388 U.S. 307 (1967). Legislation by injunction, therefore, is akin to the imposition of martial law. Such a means of governance is repugnant to our system of republican democracy.

Third, the task of a court is to examine a law for constitutionality and/or apply it to factual circumstance, not to draft laws. When a judge issues a substantive injunction, one level of judicial review is effectively removed. A challenge to the constitutionality of a statute, regulation or ordinance is viewed first by a trial court, then on appeal, as appropriate. In an injunctive setting, the first opportunity for review by one not directly involved in the drafting process is the appeal.

Courts refuse to rewrite unconstitutional laws; a court should be loathe to write the law in the first place in the form of a substantive injunction. *See, Clark v. Community For Creative Non-Violence,* 468 U.S. 288, 299 (1984) ("we do not believe . . . that . . . the time, place or manner decisions assign to the judiciary the authority to replace [government officials] as the manager of [public forum property - here, parks]"); *Gregory v. Chicago,* 394 U.S. 111, 118 (1969) (Black, J., concurring) ("it is not our duty and indeed not within our power to set out and define with precision just what statutes can be lawfully enacted to deal with situations like the one confronted here by police and protectors . . . .").

Fourth, judicial creation of new substantive laws, by means of injunction, bypasses and denigrates the legislative function of elected, representative bodies. City councils and state legislatures have the task of enacting laws defining offenses and regulating conduct. If a city council

declines to enact a "First Amendment Free Zone", a court should not preempt this representative decision by passing the same restriction in injunctive form. Such misuse of the judiciary overburdens the court and encourages elected officials to evade responsibility by referring citizens' complaints to the court. *Cf., New York Times Co. v. United States,* 403 U.S. 713, 714 (1971) (Marshall, J., concurring) (Constitution does not provide for "government by injunction" by which courts may make law. . . . "); *Id.* at 731 (White, J., concurring) (prior restraint not justified, "at least in the absence of express and appropriately limited [legislative] authorization. . . . "). Consequently, the Court should determine that the constitutionally mandated separation of powers, and the above considerations, render substantive injunctions such as the one at issue here invalid.

III.

Since the Injunction is Not Narrowly Tailored, it is Invalid as a Prior Restraint on Speech

Enforcement of the "First Amendment Free Zones" of the Injunction involved herein against peaceful expression is an unconstitutional prior restraint. *See, e.g., New York Times Co. v. United States,* 403 U.S. 713 (1971); *Organization For a Better Austin v. Keefe,* 402 U.S. 415 (1971); *Near v. Minnesota,* 283 U.S. 697 (1931). To be lawful, a prior restraint "must fit within one of the narrowly defined exceptions to the prohibition against prior restraint." *Southeastern Promotions, Ltd. v. Conrad,* 420 U.S. 546 (1975). "Prior restraint on expression comes to this Court bearing

a heavy presumption against its constitutional validity." *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963).

As discussed above, the peaceful expressive activity of Petitioners is protected by the First Amendment. Among other things, Petitioners openly make the public aware of their opposition to Respondents' performance of human abortions. The performance of human abortions was - and is - offensive to Petitioners, just as the views and beliefs of Petitioners are, no doubt, offensive to Respondents. "But so long as the means are peaceful, the communication need not meet [Respondents'] standards of acceptability." *Keefe*, 402 U.S. at 419. Indeed, as the Eleventh Circuit Court of Appeals indicated in the related case involving this same Injunction:

It is tempting, of course, to entertain the argument that the speech in this case is disruptive, discourteous, and offensive, but that is irrelevant. The Supreme Court recently reminded us:

> [a]s we have often had occasion to repeat, " '[T]he fact that society may find speech offensive is not a sufficient reason for suppressing it. Indeed, if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection.' "
> [Citations]
> " 'If there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.' "
> [Citations]

> *Simon & Schuster v. New York Crime Victims Bd.* ___ U.S. ___, ___, 112 S.Ct. 501, 509, 116 L.Ed.2d 476 (1991). We protect much that offends in the name of free speech – we cannot refuse such protection to those who find abortion morally reprehensible.
> *Cheffer v. McGregor*, 6 F.3d 705 (11th Cir. 1993).

The Court spoke directly to this issue in *New York Times Co. v. United States*. That case established that speech on matters of public concern has an immunity from pre-publication restraints that is nearly absolute. In its opinion, the Court re-emphasized that "[any] system of prior restraints on expression comes to this Court bearing a heavy presumption against its constitutional validity." 403 U.S. at 714 (*citing Bantam Books* and *Near*). A proponent "thus carries a heavy burden of showing justification for the imposition of such a restraint." *Id., citing Organization For a Better Austin v. Keefe*, 402 U.S. 415 (1971).

Respondents have no right to be free from public criticism of their human abortion business. *See, e.g., Keefe*. "No prior decisions support the claim that the interests of an individual in being free from public criticism of his business practices . . . warrants use of the injunctive power of a court." *Id.* at 419.

> "An order issued in the area of First Amendment rights must be couched in the narrowest terms that will accomplish the pin-pointed objective permitted by constitutional mandate and the essential needs of the public order. In this sensitive field, the State may not employ 'means that broadly stifle fundamental personal liberties when the end can be more narrowly

> achieved.' [Citation]. In other words, the order must be tailored as precisely as possible to the exact needs of the case."
> *Carroll v. President & Comrs. of Princess Anne*, 393 U.S. 175 (1968).

As discussed above, the restraint here at issue is not narrowly tailored. It fails to differentiate between lawful and unlawful conduct, between violent and nonviolent conduct, and operates as a complete ban on speech within the "First Amendment Free Zones" established by the order.

Since the Injunction here at issue is not "couched in the narrowest terms that will accomplish the pin-pointed objective" or "tailored as precisely as possible to the exact needs of the case", it cannot constitutionally be permitted to stand.

IV.

The Four-Part *O'Brien* Test Does Not Justify the Injunction Here

The Court has observed that "when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify *incidental* limitations on First Amendment freedoms." *United States v. O'Brien*, 391 U.S. 367 (1968) (emphasis added). After analyzing the various terms used to characterize the quality of governmental interest which must appear to justify such a regulation, the Court concluded:

> Whatever imprecision inheres in these terms, we think it clear that a government regulation is

> sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.
> 391 U.S. at 377.

As discussed above, a substantive injunction of the type here involved is, in essence, a legislative act. As such, it is not within the constitutional power of the government. U.S. Constitution, Article I, Section 1.[13] Accordingly, there is no justification for regulation of the speech here at issue.

The second part of the *O'Brien* test is that the regulation further an important or substantial governmental interest. The only governmental interests said to be furthered by the Injunction in this case are protection of a woman's freedom to seek abortion, insuring public safety and order, promoting the free flow of traffic on public streets and sidewalks, and protecting private property rights. *Operation Rescue, et al. v. Women's Health Center, Inc., et al.*, 626 So.2d 664, 672 (1993).

The interests asserted here do not justify the restriction. This Court has stated that free speech on issues of public concern lies at the core of the First Amendment, and on the highest rung of First Amendment protections

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[13] "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." U.S. Const. Art. I, Section 1.

(*NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982); *Carey v. Brown*, 447 U.S. 455, 467 (1980)). A "prior restraint on expression comes to this Court bearing a heavy presumption against its constitutional validity." *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 71 (1963). Thus, while the interests articulated by the Florida Supreme Court as justifying the regulation may be valid interests in which a state may engage, they are by no means of sufficient import or substance to justify suppression of peaceful, lawful, speech.

Under *O'Brien*, to be justified, the regulation of expression must be unrelated to the suppression of free expression. *Texas v. Johnson*, 491 U.S. 397, 403 (1989). The Injunction here cannot meet this standard. Not only is it related to the suppression of free expression, its principal effect is to suppress free expression.

Finally, and most importantly, the *O'Brien* test requires that the restriction on First Amendment freedoms be incidental, and no greater than is essential to the furtherance of the governmental interest. As mentioned above, the interests are that of permitting women to obtain abortions, concerns about traffic, public safety and order, and protecting property rights. It is respectfully submitted that a total ban on the specified communicative activity on the public streets and sidewalks within the "First Amendment Free Zones" cannot be justified as a reasonable place restriction, or as essential to the furtherance of the articulated interests.

Just such a total ban on expression was overturned by this Court, stating, "We are convinced, however, that

the section, which totally bans the specified communicative activity on the public sidewalks around the Court grounds, cannot be justified as a reasonable place restriction primarily because it has an insufficient nexus with any of the public interests [sought to justify it]." *United States v. Grace*, 461 U.S. 171, 181 (1983) (footnote omitted). As the Court went on to state, "We do not denigrate the necessity to protect persons and property or to maintain proper order and decorum within the Supreme Court grounds, but we do question whether a total ban on carrying a flag, banner or device on the public sidewalks substantially serves these purposes." 461 U.S. at 182.

Like the statute banning such conduct in *Grace*, the ban on expressive conduct here is unconstitutional.

CONCLUSION

For the foregoing reasons, the decision of the Florida Supreme Court should be reversed.

Respectfully submitted,

Scott L. Thomas
American Family Association
Law Center
P.O. Drawer 2440
Tupelo, MS 38803
(601) 844-5036

APPENDIX A

[LOGO]
Liberty Counsel

February 11, 1994

Honorable William K. Suter
Clerk, United States Supreme Court
One First St., N.E.
Washington, D.C. 20543

RE: Judy Madsen, Shirley Hobbs and Ed Martin v. Women's Health Center, Inc., et al; Case 93-880

Dear Mr. Suter:

Pursuant to agreement between the Petitioners and Respondents, the undersigned in their representative capacities by their signature below agree to grant one another a general consent for the filing of amici briefs in support of either party. This letter and the signatures below represent consent registered with this court so that the Petitioners are consenting to the filing of any and all amici briefs by Respondents and Respondents are consenting to the filing of any and all amici briefs in support of the Petitioners.

Sincerely,

/s/ Mat Staver
Mathew D. Staver, Esq.
On behalf of Petitioners

/s/ Susan A. England
Susan A. England, Esq.
on behalf of
Respondents

MDS:psb

Post Office Box 540774 • Orlando, Florida 32854 •
Telephone (407) 875-2100 • Fax (407) 875-8008

[LOGO]
Liberty Counsel

January 25, 1994

Scott Thomas, Esq.
American Family Association
PO Drawer 2440
Tupelo MS 38803

RE: Judy Madsen, Shirley Hobbs and Ed Martin v. Women's Health Center, Inc., et al
Case 93-880

Dear Scott:

The undersigned is counsel of record for July Madsen, Ed Martin and Shirley Hobbs, the appellants in the above styled case. This letter serves as written consent for you to file an amicus brief on behalf of the appellants. The issue that we would like for you to brief involves *NAACP v. Claiborne Hardware* for the issue of lumping protected with unprotected speech. The appellants' Initial Brief is due to be filed in the Court on March 4, 1994, and the respondents' Brief is due to be served on April 1, 1994.

If you have any questions, please feel free to contact me.

/s/ Mat Staver
Mathew D. Staver, Esq.

MDS:psb
Enclosures

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APPENDIX B

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const., Amend. 1.

No. 93-880

MAR 4 1994
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1993

JUDY MADSEN, ED MARTIN, and SHIRLEY HOBBS,

Petitioners,

v.

WOMEN'S HEALTH CENTER, INC., AWARE WOMAN CENTER FOR CHOICE, INC., EPOC CLINIC, INC., AND CENTRAL FLORIDA WOMEN'S HEALTH ORGANIZATION, INC.,

Respondents.

On A Writ Of Certiorari To The Supreme Court Of Florida

BRIEF OF CHRISTIAN LEGAL SOCIETY, AMERICANS UNITED FOR LIFE, CATHOLIC LEAGUE FOR RELIGIOUS AND CIVIL RIGHTS, CHRISTIAN LIFE COMMISSION OF THE SOUTHERN BAPTIST CONVENTION, FAMILY RESEARCH COUNCIL, AND NATIONAL ASSOCIATION OF EVANGELICALS, *AMICI CURIAE*, IN SUPPORT OF THE PETITIONERS

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

Whether the state court injunction against the speech and expressive activity of abortion protestors was so vague in some parts as to permit discriminatory, viewpoint-based enforcement of the injunction in violation of the First Amendment.

Whether the state court injunction against the speech and expressive activity of abortion protestors, even when clear in its terms, was so overbroad as to chill speech protected under the First Amendment.

Whether the state court injunction exceeded the remedial powers of a court.

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STATEMENT OF INTEREST

Amici are civil rights and religious organizations dedicated to the advocacy of strong protection for freedom of speech, and for the first of our civil liberties, religious freedom. Although the underlying contentions about abortion are controversial, we file this brief simply to abide by a golden rule of civil discourse that would secure for others the rights we wish guarded for ourselves.

Among the civil rights that religious organizations wish to exercise is the ability to influence public debate about matters of public concern, free from excessive regulation or control by the government. This is especially true of *judicial* regulation, such as the injunction at issue in this case, for *Amici* frequently have recourse to the courts to protect their fundamental rights.

When the state courts fail to conform to the minimal guarantees secured in the federal constitution, *Amici* find it proper to "take alarm at this first experiment on our liberty." James Madison, *Memorial and Remonstrance Against Religious Assessments*, ¶ 3 (1785), *cited* in *Everson v. Board of Education*, 330 U.S. 1, 65 (1947) (Rutledge, J., dissenting).

Irrespective of our views about abortion and the conduct of some advocates on both sides of this burning controversy, we are all committed to the principle of equality of all speakers before the law, and we view with particular alarm the diminution of care about First Amendment values that we see reflected in the decisions below.

Amici do not view their liberty in religious matters to be merely a sub-category of free speech or a constitutional redundancy, but to be an inalienable right that is distinct and foundational for all of the other civil liberties secured in the First Amendment. In the words of a bicentennial document celebrating religious liberty, "It [religious liberty] is the foundation of, and is integrally related to, all other rights and freedoms secured by the Constitution. This basic civil liberty is clearly acknowledged in the Declaration of Independence and is ineradicable from the long tradition of rights and liberties from which the Revolution sprang." *Williamsburg Charter*, 8 *J. L. & Relig.* 5 (1990).

The particular statements of interests are attached in Appendix A. This brief is filed with the consent of the parties.

SUMMARY OF ARGUMENT

The principal difficulty that *Amici* perceive with the intent and effect of the injunction below is that it undermines the First Amendment's commitment to equality of all speakers in the public square. This Court has held this guarantee to be true not only of secular speakers, but has, in effect, guaranteed that religiously motivated speakers of both sides of controversial matters will have the same opportunity for expressing their views as secular speakers. *Lamb's Chapel v. Center Moriches Union Free School District*, 113 S.Ct. 2141 (1993); *Bd. of Educ. of Westside Community Schools v. Mergens*, 496 U.S. 226 (1990); *Widmar v. Vincent*, 454 U.S. 263 (1981). It is, moreover,

fundamental to the understanding of the Establishment Clause that all religious groups are equal under the law. *Larson v. Valente*, 456 U.S. 228 (1982); *see also* Michael Paulsen, Religion, Equality, and the Constitution: An Equal Protection Approach to Establishment Clause Adjudication, 61 *Notre Dame L. Rev.* 311 (1986).

This equality of all speakers on controversial matters was compromised by the issuance of the injunction below, which appears to the *Amici* to be aimed at one side in the abortion debate. Even if it had not been intentionally aimed at one viewpoint, the effect of the injunction was not neutral as to viewpoint. Speakers on one side of the controversy were arrested while speakers on the other side were not, despite the fact that the latter, too, were making noise outside the clinic, as prohibited on the face of the injunction.

Amici offer three legal rationales for reaching the conclusion that the injunction at issue here is constitutionally infirm. First, the inherent vagueness of portions of the injunction allowed discriminatory, viewpoint-based enforcement. Second, even where the injunction was crystal clear, it is fatally overbroad, not narrowly tailored. Third, the standards governing the equitable power of courts announced by this Court require the reversal of the decision below because the remedial power of a state court to enjoin speech or expressive activity, which in our view should not be greater than that of the federal courts, was exceeded here.

ARGUMENT

I. The vagueness and overbreadth of the state court injunction aimed at one side in the abortion controversy is contrary to the national commitment to "uninhibited, robust, and wide-open" debate on matters of public concern

Amici note at the outset the national commitment to "uninhibited, robust, and wide-open" debate on matters of public concern. *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964). This Court, moreover, has frequently recognized the right of religious organizations to engage in vigorous advocacy on matters of public policy. For example, in *Walz v. Tax Commission of the City of New York*, 397 U.S. 664 (1970), the Court acknowledged: "Adherents of particular faiths and individual churches frequently take strong positions on public issues including . . . vigorous advocacy of legal or constitutional positions. Of course, churches as much as secular bodies and private citizens have that right." *Id.* at 670. And in *McDaniel v. Paty*, 435 U.S. 618 (1978), Justice Brennan noted:

> That public debate of religious ideas, like any others, may arouse emotion, may incite, may foment religious divisiveness and strife does not rob it of constitutional protection. . . . [R]eligious discussion, association, or political participation [is not] in a status less preferred than rights of discussion, association, or political participation generally. . . . The State's goal of preventing sectarian bickering and strife may not be accomplished by regulating religious speech and political association. . . .

Id. at 641 (Brennan, J., concurring).

Many of the *Amici* have themselves engaged in various forms of advocacy, whether through the filing of amicus briefs in this Court as in this instance, or through a wide variety of speech and expressive activity that they deem consonant with the teachings of our religious communities.[1] As the Williamsburg Charter puts it, "Many of the most dynamic social movements in American history, including that of civil rights, were legitimately inspired and shaped by religious motivation." *The Williamsburg Charter, 8 J. L. & Relig.* 5, 20 (1990); *see also* Dean Kelley, The Intermeddling Manifesto, or the Role of Religious Bodies in Affecting Public Policy in the United States, 8 *J.L. & Relig.* 85 (1990) (discussing several historical instances of religiously motivated participation in American politics); *and see* Samuel Rabinove, How – and Why – American Jews Have Contended for Religious Freedom: The Requirements and Limits of Civility, 8 *J. L. & Relig.* 131 (1990).

In recent times America has frequently contrasted itself favorably to totalitarian regimes of the Left and the Right that swallowed up their opposition, sending them to the death camps and the Gulags for extermination. We

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[1] The fact that the life issues presented in the abortion debate may be influenced by religious convictions does not, of course, mean that abortion is a taboo subject for public debate on the ground that it is primarily a religious concern. On the contrary, the most difficult issues in this conflict frequently involve differences in perspectives about biological determinations, and the allocation of public resources for health care, all of which are manifestly appropriate for open, public debate. *See, e.g., Bray v. Alexandria Women's Health Clinic*, 113 S.Ct. 753, 760 (1993); *Planned Parenthood of Southeast Pennsylvania v. Casey*, 112 S.Ct. 2791, 2806 (1992); *Harris v. McRae*, 448 U.S. 297 (1980).

take some pride in the way we have tolerated the strong voice of protest within our legal and political culture. Perhaps we have taken too much pride in our treatment of dissidents in view of the harsh penalties that were frequently applied to them. Whatever the right blend of pride and humility about our past, it is undeniable that our dissidents have at many critical turning points of American history helped to shape our destiny. But it has been alot easier to recognize the value of radical protest decades afterwards, when the position the protesters espoused was more broadly received by the people and incorporated into our laws.

A classic illustration of this point is the eradication of the slavery system, which nearly everyone in America would now regard as the just and rightful repudiation of a brutal and inhuman labor system. Some might claim that slavery might have been abolished earlier and with less bloodshed on the battlefields of the Civil War if the Abolitionists had been more "accommodating" to their adversaries, but this revisionist view overlooks the hard mindset of the slaveholders who would brook no compromise on the matter of slavery as an inalienable property right. For example, some of the congressional supporters of slavery got to the point where they literally did not want to hear about arguments against slavery. In 1836 they imposed what is known as the "Pinckney gag," which prohibited any discussion of the slavery issue in the House of Representatives. Congressman John Quincy Adams (then in his seventies) strenuously opposed the gag as a violation of the people's right to petition the government, which he deemed co-extensive with the freedom of speech. These efforts earned Adams the

nickname, "Old Man Eloquent," but the gag lasted until 1844. As antebellum America became increasingly censorious, not tolerating open debate about the raging controversy of slavery, it became more and more inevitable that the issue would be resolved by "the blood of brave men on both sides which was shed on the terrible battlefields of Shiloh and Gettysburg and Cold Harbor," *Carey v. Population Services International*, 431 U.S. 678, 717 (1977) (Rehnquist, J., dissenting). The stifling of dissent led over 600,000 young men to their graves.

Whatever the possible outcome of alternative hypothetical scenarios on the slavery issue, the fact remains that the Abolitionists were indeed radical in their day. The most famous of the Abolitionists, William Lloyd Garrison, was uncompromising in his campaign for immediate and complete abolition of slavery. In the first issue of *The Liberator* (Jan. 1, 1831) Garrison publicly renounced his previous position of gradual abolition and asked "pardon of my God, of my country, and of my brethren, the poor slaves, for having uttered a [gradualist] sentiment so full of timidity, injustice and absurdity." And he wrote: "urge me not to use moderation in a cause like the present! I am in earnest. I will not equivocate – I will not excuse – I will not retreat a single inch – AND I WILL BE HEARD." As cited in *The Abolitionists: A Collection of Their Writings* 31 (Louis Ruchames ed. 1963) (emphasis in original).

It can plausibly be maintained that less famous Abolitionists were more effective in moving the hearts of

their countrymen, but Garrison and the radical Abolitionists were ultimately heard indeed. As Garrison put it in the opening issue of *The Liberator*, "POSTERITY WILL BEAR TESTIMONY THAT I WAS RIGHT." As cited in *The Abolitionists: A Collection of Their Writings* 31 (Louis Ruchames ed. 1963) (emphasis in original). Although not all of the acts of the Abolitionists would gain support even today, the basic thrust of their movement has now clearly prevailed in American law. Decades after the failure of the problematic period of "Reconstruction," we are now more committed than ever to the enforcement of the Civil War Amendments that would have been inconceivable without the firm resolve of the "Radical Republicans" and their moral progenitors, the Abolitionists.

Not to be overlooked in the story of abolition of slavery is the significant role of religious groups like the Quakers in the forefront of the operation of the underground railroad, the Methodists at Lane Seminary in Ohio who forced the slavery issue to the top of the academic agenda throughout the Midwest, and the Congregationalist preachers in New England who gave spirited, rousing sermons to stir up an impassioned response to the slavery system. For example, citing the prophet Isaiah (28:18), the Abolitionists in Boston used to denounce the United States Constitution as "a covenant with death, a compact with hell," and they burned this document as part of the liturgy of their annual meeting to symbolize their repugnance at its flawed compromise over slavery.[2]

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[2] See Edward McGlynn Gaffney, Politics Without Brackets on Religious Convictions: Michael Perry and Bruce Ackerman on Neutrality, 64 *Tulane L. Rev.* 1143 (1990).

To be fair to the complexity of the past, the slavery issue divided religious communities in this country in the nineteenth century,[3] much in the way that abortion does today. This fact, however, cuts in favor of governmental neutrality with respect to various speakers on burning issues, and does not justify the one-sided approach manifested in the injunction here.

A. The state court injunction against the speech and expressive activity of abortion protestors was so vague in some parts as to permit discriminatory, viewpoint-based enforcement of the injunction in violation of the First Amendment

Many of the terms of the injunction are crystal clear. For example, even an empiricist from the University of Chicago should be content with the precision of the designation of a 36 foot buffer zone, or a similar line drawn 300 feet from the entrance of the abortion clinic where the events at issue here took place.

There are, however, some provisions in the injunction that cause serious difficulties of interpretation both for those against whom they were aimed and for those with enforcement responsibilities. For example, the injunction forbids "sounds or images observable to or within earshot of the patients inside the Clinic." Pet. App. B-8. Noise levels may be easy to measure with a decibel meter, but how is one who is standing on a picket line and

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[3] See Anson Phelps Stokes, 2 *Church and States in the United States* 156-203 (1950).

speaking at a normal volume to know whether her voice is audible inside the clinic? Again, one could obviously expect that a blimp blocking out the very rays of the sun would have an observable effect inside the clinic, but can this standard make much sense in the normal course of business on American picket lines? All one has to do to answer this question is to change one fact in this case. Make it a union picket line, or make it a group of angry consumers protesting a product known to be carcinogenic, or make it a group of animal rights advocates upset with the sale of furs, and the result seems plain. This standard could not pass muster, in part because it vests too much discretion in the peace officers charged with carrying out the injunction.

Another instance of an impermissibly vague provision in the injunction is the command to refrain "from physically approaching any person seeking the services of the Clinic unless such person indicates a desire to communicate by approaching or by inquiring of the [demonstrators]." Pet. App. B-8. The word "approaching" is used twice, with apparently inconsistent meanings. To be on the safe side of being arrested, a sidewalk counselor[4] must understand it to mean that she may not

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[4] In *Planned Parenthood v. Casey, supra,* this Court sustained the portion of the Pennsylvania statute that mandated the provision of information that would enable the consent of a woman seeking an abortion to be fully informed. 18 Pa. Cons. Stat. Ann. § 3205. It did so on the view that "[i]n attempting to ensure that a woman apprehend the full consequences of her decision, the State furthers the legitimate purpose of reducing the risk that a woman may elect an abortion, only to discover later, with devastating psychological consequences, that her decision was not fully informed." *Casey,* 112 S.Ct. 2791, at 2823 (Opinion of O'Connor, J., Kennedy, J., and Souter, J.). The State of Florida, however, does not require that women seeking an abortion receive the sort of information about this procedure that the Commonwealth of Pennsylvania requires. In fact, if the Florida legislature had enacted such a statute, doubt has been cast on its validity under the state constitution. *In re T.W.,* 551 So. 2d 1186 (Fla. 1989). Thus the sidewalk counselors enjoined in this case were attempting as private actors to provide the information and alternative perspectives that were supplied by the State in *Casey.*

physically approach even in the sense of moving in the direction of a person seeking the services of the abortion clinic unless that client has "approached" her in the sense of coming very close to her. Or would a step forward do? If the step is misread, then the false step can land the protester in jail. And even if a clinic patient comes into close physical proximity with the sidewalk counselor, how is the counselor to know whether this "approach" really implicates a "desire to communicate"? Would a nod serve to indicate that she is willing to hear her message? Would we tolerate such a standard for striking union members, boycotting consumers, or animal rights advocates?

A third instance of vagueness is found in the same paragraph of the injunction, which also instructs the demonstrators "not to accompany . . . , encircle, surround, harass, threaten or physically or verbally abuse those individuals who choose not to communicate with them." Pet. App. B-9. As college administrators have discovered to their chagrin, there is a problem with speech codes. What, for example, does one do with the

epithet, "You water buffalo"? Is that harassing, threatening, or verbally abusive? The line is not clear in many of these new campus guidelines for proper speech. *See, e.g.*, Nat Henthoff, *Free Speech for Me – But Not for Thee: How the American Left and Right Relentlessly Censor Each Other* (1992). Neither is it here. Normally one will know what it means to refrain from physical abuse, but many of the verbs in this paragraph of the injunction fall far short of the requisite clarity. The problem of determining whether a woman entering a clinic "choose[s] not to communicate" with a demonstrator is similar to that noted above about knowing when such a woman "indicates a desire to communicate." Again, these terms give too much discretion to the arresting officer and too little information to the demonstrator to know how to avoid an arrest.

In *Grayned v. City of Rockford*, 408 U.S. 104 (1972) this Court has summarized the three basic values that are upheld by a standard that requires clarity in criminal statutes:

> First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, but related, where a vague statute "abut[s] upon sensitive areas of basic First Amendment freedoms," it "operates to inhibit the exercise of those freedoms." Uncertain meanings inevitably lead citizens to " 'steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked."

Id. at 108-109 (footnotes omitted); *see also Papachristou v. City of Jacksonville* 405 U.S. 156 (1972); *and see Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926).

Here all three values inherent in the vagueness doctrine are in play. The demonstrators did not have sufficient notice to avoid arrest if they chose to do so. The arresting officers were not given narrowly tailored instructions to inform and guide their discretion; indeed, they were practically told to arrest petitioners for the same conduct which pro-choice demonstrators were engaged in at the same time and place.[5] And the conduct for which the demonstrators were arrested was expressive activity that would normally be deemed protected if

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[5] Demonstrations at the facility drew both anti-abortion and pro-clinic supporters, often resulting in heated exchanges between individuals from both groups. Pet. App. B-2, B-3. During the demonstrations, Operation Rescue "and those aligned with them, remained primarily in the public right of way (paved and unpaved). The pro-choice demonstrators would be on the edge of the clinic's lawn and parking lot (private property) but occasionally attempt[ed] to share the sidewalk with the opposition." Pet. App. B-3 ¶ D. The Florida Circuit Court [trial court], however, did not find the threat of noise sufficiently compelling to include both pro-life and pro-choice demonstrators within the restrictions of the injunction, although both groups created the "noise" enjoined by the court. Pet. App. B-2, B-3 ¶ C.

it were engaged in by those espousing causes other than the pro-life side of the abortion debate.

The vice of discrimination as an aspect of vagueness becomes more apparent on this record when attention is focused on the hearing conducted on April 12, 1993, by the Hon. Robert McGregor, the trial judge who issued the injunction. Under the terms of the amended permanent injunction, individuals arrested for acting "in concert" with the named parties were brought before Judge McGregor for a hearing. Pet. App. B-9. Excerpts from this hearing illustrate the very real problems created by the vagueness of the definition of what constitutes acting "in concert." Judge McGreger himself had difficulty explaining the scope of the term "in concert" to the people arrested under the injunction he had written. The significance of the fact that even the judge issuing the order did not comprehend the precise meaning of the terms of the injunction illustrates the difficulty of regarding its restrictions as narrowly tailored.[6]

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[6] Included among the company of the confused was the City of Melbourne, Florida, where these events took place. After having arrested over 100 persons on the strength of this injunction, the City filed a motion to intervene in these proceedings, pleading with the Circuit Court for "guidance" as to the meaning of the term "in concert" in the injunction. *See* Motion to Intervene and to Clarify Amended Permanent Injunction, ¶¶ 4, 8. It was a little late to ask for clarification as to whether a person acting "in concert" could be known when seen. *See also* the following colloquy between one of the arrestees and Judge McGregor:

> JOHN DOE NO. 31: What kind of [in concert] activities would those be? I mean how could they just by looking at me determine that I was acting in concert? I want to know what I –
>
> THE COURT: You were there. I wasn't. I can't give you any more than what I've given you. You know what you were doing.

Excerpts from the April 12, 1993 appearance hearing held before Circuit Judge McGregor, page 149 line 1 through page 149 line 7.

For example, the following colloquy took place between the judge and one of the demonstrators:

> JOHN DOE NO. 16: I understand from the conversation that's taken place so far that I'm being arrested because I was perceived to have been acting in concert with those who were praying or violating any of the other injunctions in the Court Order. Is that true?
> THE COURT: Yes, sir.
> JOHN DOE NO. 16: On what basis was that determination made?
> THE COURT: *Whatever activities you were engaged in seemed to be supportive of pro-life. . . .*
> JOHN DOE NO. 16: My understanding is that there were other demonstrators in the restricted area that were not acting in concert with us. And I wanted to know how that determination was made?
> THE COURT: Whatever the police officer perceived by looking.
> JOHN DOE NO. 16: Were the beliefs in ideology of those people, did that have anything to do with the determination in the Injunctive Order or in the arrest?
> THE COURT: You know, I wasn't there. I don't know. All I know is that the officer used his perceptions, his eyes, his ears, took note of the activities that were going on and for reasons, you know, he believed that you were in concert with those that had been enjoined and the

> Injunctive Order is expanded to include those so that you were subject then to the injunction. . . .
> JOHN DOE NO. 16: *When you issued the injunction did you determine that it would only apply to – that it would apply only to people that were demonstrating that were pro-life?*
> THE COURT: *In effect, Yes.*

Excerpts from the April 12, 1993 appearance hearings held before Circuit Judge McGregor, p. 112 line 25 through p. 113 line 10 (J.A. 72); p. 114 line 17 through p. 115 line 10 (J.A. 73); p. 116 line 14 through p. 116 line 18 (J.A. 74) (emphasis supplied).

B. The state court injunction against the speech and expressive activity of abortion protestors, even when clear in its terms, was so overbroad as to chill speech and expressive activity protected under the First Amendment.

With the exception of the provisions discussed above, most of the terms in the injunction are sufficiently clear to avoid being found void for vagueness. But, as this Court also taught in *Grayned*, "[a] clear and precise enactment may nevertheless be 'overbroad' if in its reach it prohibits constitutionally protected conduct. . . . The crucial question, then, is whether the [ban] sweeps within its prohibitions what may not be punished under the First . . . Amendment." *Grayned*, 408 U.S. at 114-115.

The vice of a truly overbroad statute is that it conjoins in a single ban both conduct that may legitimately be proscribed and conduct that may not. The same must

be said of a judicial order such as the injunction here.[7] It has a ripple effect far beyond the parties, sending a chill into the air that would make a person think twice before engaging in protected activity. For this reason, this Court has repeatedly clarified that "In the First Amendment context, litigants . . . are permitted to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression." *Virginia v. American Booksellers Assoc., Inc.*, 484 U.S. 383, 392-93 (1988) (internal quotations omitted); *see also Secretary of State of*

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[7] In *Broadrick v. Oklahoma*, 413 U.S. 601 (1973), the Court changed the standard for determining whether a *statute* or *ordinance* should be invalidated on overbreadth grounds. Recognizing that this result – invalidating a statute or an ordinance – is potent medicine, the Court required a showing of "substantial overbreadth," i.e., evidence that in a substantial number of instances a statute or ordinance would have the impermissible effect of chilling speech or protected activity. Here, since there is only a judicial decree rather than an act of elected officials, the rationale for this higher standard is absent. No judicial deference to the political branches is necessary for the obvious reason that only the judiciary was involved in issuing the decree. This Court need only find that the judges below have issued or sustained an injunction that would have the effect of chilling some speech or protected activity. In any event, in the view of the *Amici*, the injunction is substantially overbroad, as the hypothetical examples from other controversial areas of speech (union picketers, consumer boycotters, and animal rights activists) offered above illustrates.

Maryland v. Joseph H. Munson Co., 467 U.S. 947, 956-57 (1984); *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973).[8]

The vice of overbreadth is that the tool used to achieve a legitimate goal is inept, like using an elephant gun to shoot a mouse. Here the problem is that the most traditional public forum imaginable in our culture was closed down by judicial decree. The parks, sidewalks, and streets have "from time immemorial" been held open in trust for the people as public fora for use through assembly, debate, and the discussion of public questions.[9] *Perry Education Assn., v. Perry Local Educators' Assn.*, 460 U.S. 37, 45 (1983), *citing Hague v. CIO*, 307 U.S. 496, 515 (1939); *see also Frisby v. Schultz*, 487 U.S. 474, 479-81 (1988). In this

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[8] There is no serious issue of standing here. Petitioners were named defendants in the injunction and those allegedly acting "in concert" with them testified to the effect that the injunction had a chilling effect upon them. Even if there were no allegation of such direct injury, the overbreadth claim brought by the petitioners confers standing upon them to represent third parties whose free speech was chilled by the injunction.

[9] In the past decade the public square has been shrinking. For example, this Court has diminished the ability of religious organization to roam freely through a public park while a state fair is being conducted. *Heffron v. International Society for Krishna Consciousness*, 452 U.S. 640 (1981). It has told us that the sidewalks in front of post offices are no longer as open a forum as we had thought even before the days of "Boss Hague." *United States v. Kokinda*, 497 U.S. 720 (1990). Most recently the Court has told us that we are not as free to sell our sacred literature in an airport as the purveyors of *Hustler* and *Playboy* are to sell their wares. *International Society for Krishna Consciousness v. Lee*, 112 S.Ct. 2701 (1992). With distressing precedents on "public fora" such as these, *Amici* trust that this Court will not further erode one of the last remaining places that afford the people an opportunity to communicate their views.

forum, the right of the state to limit expressive activity is sharply circumscribed. *Perry*, 460 U.S. at 45. Content-based restrictions on expression must be shown by the state to be necessary to serve a compelling state interest and narrowly tailored to achieve that end. *Id., citing Carey v. Brown*, 447 U.S. 455, 461 (1980); *see also Police Dept. v. Mosley*, 408 U.S. 92 (1972). Content-neutral time, place, manner restrictions on expression must be narrowly drawn to serve a significant government interest, while leaving open ample alternative channels of communication. *Perry*, 460 U.S. at 45 (citations omitted).

As the Court of Appeals for the Eleventh Circuit viewed the injunction, the restrictions were "no more viewpoint-neutral than one restricting the speech of 'the Republican Party, the state Republican Party, George Bush, Bob Dole, Jack Kemp and all persons acting in concert or participation with them or on their behalf." *Cheffer v. McGregor*, 6 F.3d 705, 711 (11th Cir. 1993). Whether, as the colloquy cited above suggests, the *intent* of the injunction was to aim at one viewpoint in a public controversy,[10] the practical *effect* of the injunction was to facilitate the arrest of pro-life speakers based on dubious

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[10] In support of the claim that the amended permanent injunction was drawn to encompass only pro-life speech by enjoining Operation Rescue and other pro-life organizations, specific named pro-life individuals, "and all persons acting in concert or participation with them or on their behalf . . . ," *see* Pet. App. B-6. In formulating the injunction, it appears to have been the expressed intent of the Florida Circuit Court [trial court] to address only the speech of pro-life individuals and to restrict only pro-life protest activity. Pet. App. B-6 through B-9.

"in concert" grounds, while leaving pro-choice demonstrators unhindered by any of the injunction's restrictions. *Id.*

Some would find much to criticize in the style and tactics of some forms of abortion protest. But the record with respect to the petitioners before the Court in this case discloses nothing but protected expressive activity. Stipulated Facts, ¶ 5 (Pet. App. I at 65). And *Amici* are clear about our duty to protect even speech with which some may disagree, so that the speech we cherish will not be unprotected because of our cowardice in time of crisis. As Edmund Burke put it, "The only thing necessary for the triumph of evil is for good men to do nothing." [*Letter to William Smith* (January 9, 1795)]. Or as Pastor Martin Niemoeller said of his own complicity in the deeds of the Third Reich: "When they came for the communists, I didn't do anything because I wasn't a communist. When they came for the Jews, I didn't do anything because I wasn't a Jew. When they came for the trade unionists, I didn't do anything because I wasn't a trade unionist. When they came for the Catholics, I didn't do anything because I wasn't a Catholic. When they came for me, there was no one left."

While some take offense at the petitioners' statements, this Court has repeatedly taught that " '(t)he fact that society may find speech offensive is not a sufficient reason for suppressing it. Indeed, if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection.' " *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 55 (1988) (scurrilous caricatures) *quoting FCC v. Pacifica Foundation*, 438 U.S. 726, 745 (1978) (vulgar words). Similarly, the Court wrote

in *United States v. Eichman*, 496 U.S. 310 (1990) (flag burning): " 'If there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.' " *id.* at 319, quoting *Texas v. Johnson*, 491 U.S. 397 (1989) (same); *see also Cohen v. California*, 403 U.S. 15 (1971) (vulgar repudiations of the draft); *Terminiello v. Chicago*, 337 U.S. 1 (1949) (virulent ethnic and religious epithets).

II. The state court injunction exceeded the normal remedial powers of a court.

Amici acknowledge that the case under review arises from a State court, not a federal court, and that this Court has a supervisory role over federal courts that it does not have over State courts. Nonetheless, as the petition amply illustrates, the apparent conflict that led the Court to grant review in this case involves the same parties making the same claims and represented by the same attorneys. If there ever were a case where the rules governing both courts should be the same, it is this one. We urge that the Court vacate the injunction here in light of the Court's teaching on injunctive relief in public school desegregation cases.

In *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971), Chief Justice Burger wrote for a unanimous court: "As with any equity case, the nature of the violation determines the scope of the remedy." *Id.*, 402 U.S. at 16. The Court's objective in *Swann* was to eliminate state imposed segregation of the public schools, ensuring equal

protection as guaranteed to all citizens under the Constitution. *Swann*, 402 U.S. at 15. The remedial measures necessary to attain this goal, however, were subject to general limitations on the exercise of judicial discretion. *Id.* Thus even the laudable end of correcting a constitutional wrong does not justify judicial means that exceed the proper scope of judicial intervention.

The Court noted further:

> a school segregation case does not differ fundamentally from other cases involving the framing of equitable remedies to repair the denial of constitutional rights. The task is to correct, by a balancing of the individual and collective interests, the condition that offends the Constitution. In seeking to define even in broad and general terms how far this remedial power extends, it is important to remember that judicial power may be exercised only on the basis of a constitutional violation.

Swann, 402 U.S. at 15-16.

In *Milliken v. Bradley (Milliken I)*, 418 U.S. 717 (1974) this Court vacated an injunction that went much further than the facts in *Swann*. Despite a finding of *de jure* segregation of the public schools of Detroit in violation of the Fourteenth Amendment, the Court noted that the scope of the injunction exceeded the violation itself by enjoining adjacent school districts that had not themselves engaged in any unlawful activity.

Three years after *Milliken I*, the Court heard the same case at a later phase, and approved the remedy of court-ordered payment of State funds for remedial educational programs for the children attending the Detroit schools. *Milliken v. Bradley (Milliken II)*, 433 U.S. 267 (1977). This

remedy is more closely analogous to damages than to an intrusive injunction, for the children were helped in *Milliken II* with the standard means of making an injured person whole, by paying money to repair the injury. The critical difference between the cases is that the defendant, Governor Milliken, in his official capacity represented a community – the State of Michigan – which had intentionally violated the guarantee of the Fourteenth Amendment, while the elected officials in the school districts surrounding Detroit had not engaged in any conduct violative of the Constitution.

In this case, the petitioners have not engaged in unlawful activity, but were attempting to exercise their constitutional right to assemble peaceably and to speak their minds freely about one of the most vexing social issues of the day. Stipulated Facts, ¶ 5. In this respect, they are much closer to the suburban school districts surrounding Detroit than to the official State actors in Lansing who intentionally set up a *de jure* segregated school district in violation of the Fourteenth Amendment. Hence the restraints governing injunctive power announced in *Swann*, *Milliken I*, and *Milliken II* suggest that the court below erred in issuing and in affirming the injunction. For example, *Swann* mandates judicial restraint even with injunctions that remedy clear constitutional violations; this teaching suggests that courts must be still more careful in issuing injunctions which target constitutionally protected expressive activity.

Amici do not rely only on these general principles governing the equitable power of courts to issue injunctions. For this Court has directly addressed the more specific power to enjoin *speech*. *See, e.g., New York Times*

Co. v. United States, 403 U.S. 713 (1971); *Nebraska Press Assn. v. Stuart*, 427 U.S. 539 (1976); *Near v. Minnesota*, 283 U.S. 697 (1931).[11] In all of these cases, the Court taught that there is a very heavy presumption against such injunctions, otherwise known as the vice of prior restraint, against which the Free Press Clause is directly aimed.

The Supreme Court of Florida dismissed the problem of prior restraint presented here by characterizing the injunction as "content-neutral," *citing Northeast Women's Center, Inc. v. McMonagle*, 939 F.2d 57 (3d Cir. 1991). Pet. App. A-19, A-20; *and see* A-14, A-15. Once this pretense of neutrality is rejected, as *Amici* think it must be, *see* Part I A above, the heavy burden against prior restraint of speech and expressive activity comes into play.

Standard principles governing the remedial power of courts thus yield the conclusion that the injunction issued here by the Florida Circuit Court and affirmed by the Supreme Court of Florida should be vacated because it invades constitutionally protected activity. The courts below drew lines more broadly than the First Amendment permits or the right to privacy requires.[12]

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[11] *Amici* note that the same standard governing federal injunctive power in *New York Times* also governed the state court decisions in *Nebraska Press Assn.* and in *Near*.

[12] Under *Roe v. Wade*, 410 U.S. 113 (1973), a woman has a right to be free from criminal prosecution for procuring an abortion under most circumstances. Under *Planned Parenthood v. Casey*, 112 S.Ct. 2791 (1992), she has a right to be free from regulation of the abortion decision which imposes an "undue burden" upon her. But under *Bray v. Alexandria Women's Health Clinic*, 113 S.Ct. 753, 764 (1993), "the right to abortion has been described in our opinions as one element of a more general right of privacy, or of Fourteenth Amendment liberty, and the other elements of those more general rights are obviously not protected against private infringement." An individual's reasonable expectation of privacy while traveling over public roads is much lower than the same individual's reasonable expectation of privacy in one's residence. *See Katz v. United States*, 389 U.S. 347 (1967). The right of privacy does not bestow on a pregnant woman a 300 foot wide buffer against all pro-life messages, wherever she may be. For "[w]hat is at stake is the woman's right to make the ultimate decision, not a right to be insulated from all others in doing so." *Casey, supra*, 112 S.Ct. at 2821 (Opinion of O'Connor, J., Kennedy, J., and Souter, J.).

CONCLUSION

For these reasons the decision of the Supreme Court of Florida should be reversed.

Respectfully submitted,

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Statement of Interest

The Christian Legal Society, founded in 1961, is a nonprofit ecumenical professional association of 4,000 Christian attorneys, judges, law students and law professors with chapters in every state and at 100 law schools. Since 1975, the Society's legal advocacy and information arm, the Center for Law and Religious Freedom, has advocated both in this Court and in state and federal courts throughout the nation for the protection of religious speech and exercise.

The Society is committed to religious liberty because the founding instrument of this nation acknowledges as a "self-evident truth" that all persons are divinely endowed with rights that no government may abridge nor any citizen waive. Declaration Of Independence, (1776). Among such inalienable rights are those enumerated in (but not conferred by) the First Amendment, the first and foremost of which being religious liberty. The right sought to be upheld here inheres in all persons by virtue of its endowment by the Creator, Who is acknowledged in the Declaration. It is also a "constitutional right," but only in the sense that it is recognized in and protected by the U.S. Constitution. Because the source of religious liberty, according to our nation's charter, is the Creator, not a constitutional amendment, statute or executive order, it is not merely one of many policy interests to be weighed against others by any of the several branches of state or federal government. Rather, it is foundational to the framers' notion of human freedom. The State has no higher duty than to protect inviolate its full and free exercise. Hence, the unequivocal and non-

negotiable prohibition attached to this, our First Freedom is "Congress shall make **no** law. . . . "

Americans United for Life (AUL) is a national, non-sectarian, public interest law firm and educational organization based in Chicago, Illinois. AUL's mission is to restore respect in law and public policy for all human life from conception to natural death. AUL joins this *amicus curiae* brief because of its concern that the First Amendment rights of Petitioners and others who lawfully and peacefully oppose abortion are threatened by the vague and overbroad injunctive relief upheld by the Florida Supreme Court in this case.

The Catholic League for Religious and Civil Rights is the nation's largest Catholic civil rights organization. It defends the right of Catholics – lay and clergy alike – to participate in American life without defamation or discrimination. Motivated by the letter and the spirit of the First Amendment, the Catholic League recognizes the importance of defending the religious freedom rights of all Americans, and is thus prepared to defend those rights in court.

Family Research Council conducts research and policy analysis in support of traditional Judeo-Christian values in American society. Through its publications and lobbying efforts, and through its close collaboration with such organizations as Dr. James Dobson's Focus on the Family, FRC seeks to vindicate the rights of Christians to participate as full and equal citizens in the public life of the nation.

The National Association of Evangelicals is a non-profit association of evangelical Christian denominations,

churches, organizations, institutions and individuals. It includes some 45,000 churches from 74 denominations and serves a constituency of approximately 15 million people. NAE is committed to defending religious freedom as a precious gift of God and a vital component of the American heritage.

The Southern Baptist Convention ("SBC") is the nation's largest Protestant denomination, with over 15.4 million members in over 38,200 autonomous local churches. The Christian Life Commission ("CLC") is the public policy and religious liberty agency for the SBC. Southern Baptists have expressed themselves in resolutions adopted in national conventions over the years, regarding the primacy of the principle of religious liberty, as contained in the Religion Clause of the First Amendment. The CLC seeks to advocate positions consistent with Southern Baptist convictions by filing briefs as *amicus curiae* in litigation important to these values, such as this case.

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No. 93-880

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

JUDY MADSEN, ED MARTIN,
and SHIRLEY HOBBS,

Petitioners,

v.

WOMEN'S HEALTH CENTER, INC., AWARE WOMEN'S CENTER FOR CHOICE, INC., EPOC CLINIC, INC. and CENTRAL FLORIDA WOMEN'S HEALTH ORGANIZATION, INC.,

Respondents.

ON A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA.

BRIEF OF THE RUTHERFORD INSTITUTE *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

I. Whether an anti-speech injunction purporting to bind all non-parties who are "perceived as advocating a "pro-life" viewpoint is void for lack of jurisdiction.

II. Whether an anti-speech injunction which discriminates on the bases of viewpoint and content is an unconstitutional prior restraint.

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ON A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA.

BRIEF OF THE RUTHERFORD INSTITUTE *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF AMICUS CURIAE[1]

The Rutherford Institute is greatly concerned about the threat posed by overbroad, anti-speech injunctions to the exercise of free speech interests generally. Given the "legislative tone" of the state court's injunction at issue here, and the ramifications of such an overbroad, content-based injunction on the exercise of protected speech, the Florida Supreme Court's

[1] Counsel of record to the parties in this case have consented to the filing of this brief, and letters of consent have been filed with the Clerk, pursuant to Rule 37.

decision is constitutionally intolerable. Such a precedent, if allowed to stand, would serve as a monument to the power of government to arbitrarily restrict any speech, even in a quintessential public forum, merely because it is controversial or divisive.

Amicus Curiae, The Rutherford Institute, is an international, non-profit religious organization named for Samuel Rutherford, a seventh-century Scottish minister and rector at St. Andrew's University. The Rutherford Institute is dedicated to the defense of free speech issues grounded in religious beliefs, and undertakes to assist litigants and to participate in significant cases relating to First Amendment freedoms. The Rutherford Institute believes the expertise of its counsel will be of assistance to the Court in this case.

STATEMENT OF FACTS

Amicus Curiae adopts by reference the statement of stipulated facts filed with this Court.

STATEMENT OF THE CASE

While Amicus Curiae incorporates by reference the facts contained in the brief of the petitioners, it is useful here to restate certain salient facts contained in the Trial Court's colloquy from the bench during the April 13, 1993, contempt hearing. A brief recitation of this portion of the record below serves to underscore the finding by the Eleventh Circuit Court of Appeals that the injunction is not viewpoint-neutral.[2] In addition, these excerpts demonstrate the total absence of any factual basis for finding the contemnors acted "in concert" with any named defendant.

MR. LACY: You mentioned to other John Does that we were arrested for being in a public place in concert with people that were on the Injunction whether we had read the Injunction

[2] *Cheffer v. McGregor*, 6 F. 3d 705 (11th Cir. 1993).

or not. And I was wondering how we can — why we were arrested and confined as being in concert with these people that we don't know, when other people weren't, that were in the same buffer zone, and it was kind of selective as to who was picked and who was arrested and who was obtained for the same buffer zone in the same public injunction.

THE COURT: Mr. Lacy, I understand that those on the other side of the issue were also in the area. If you are referring to them, the Injunction did not pertain to those on the other side of the issue, because the word in concert with means in concert with those who had taken a certain position in respect to the clinic, adverse to the clinic. If you are saying that is the selective basis that the pro-choice were not arrested when pro-life was arrested, that's the basis of that selection. If others who are pro-life were not selected, I can't answer that. It is the officer's discretion on the scene as to who he arrests.

(Transcript of April 13, 1993, contempt hearing at pp. 104-105.)

JOHN DOE NO. 16: When you issued the injunction, did you determine that it would only apply to — that it would apply only to people that were demonstrating they were pro-life?

THE COURT: In effect, yes.

(Transcript of April 13, 1993, contempt hearing at p. 116.)

There is no dispute but that persons unrelated to the named defendants who happened into the buffer zone, without notice of the terms of the injunction, were arrested and incarcerated merely for penetrating the buffer zone. Law enforcement authorities were given very broad discretion in the determination of who was acting "in concert" with those named in the injunction. Moreover, there is no dispute but that the law enforcement officials charged with enforcing the injunction understood that it applied only to those engaging in *pro-life* speech activity.[3]

[3] See *Cheffer v. McGregor*, 6 F. 3d 705 (11th Cir. 1993). As the Eleventh Circuit Court of Appeals noted:

SUMMARY OF ARGUMENT

Although the setting for this case is the divisive abortion controversy, it is not merely an "abortion case." This case involves principles of procedural and substantive due process and jurisdiction that go to the core values of American jurisprudence concerning the legitimate authority of a court. Its implications extend beyond this controversy to any case involving picketing and speech and, indeed, to nearly any case in which injunctive relief is sought and/or contempt sanctions are imposed.

The Amended Permanent Injunction (herein-after "Injunction"), entered on April 8, 1993, by the Circuit Court for the Eighteenth Judicial Circuit of Florida, violates constitutional doctrines of procedural due process and jurisdiction which prohibit a court from punishing as contempt the acts of non-parties when there is neither an allegation nor a finding that they are legally identified with, or aiders and abetters of, a party properly enjoined.

Moreover, the injunction violates well-established constitutional free speech doctrines, limiting the power of a court to impose content-based restraints on the exercise of free speech in a quintessential public forum. This, coupled with the imposition of criminal sanctions on contemnors, subjectively perceived as acting "in concert" with the named defendants, constitutes an impermissible prior restraint on the exercise of free speech rights. It is axiomatic that one's right to free expression of ideas cannot be conditioned on the subjective perceptions of others, here law enforcement officials, who may arbitrarily determine

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Several of those arrested testified (at a preliminary hearing convened by Judge McGregor as provided for in the injunction) that they were designated for arrest by clinic workers and police officers because they were perceived to be "pro-life."

Id. at 708.

that the speaker is motivated by a particular idealogy or set of beliefs.

ARGUMENT

I. The Phrase "In Concert" is a Jurisdictional Limitation on a Court's Power to Punish as Contempt the Acts of Non-Parties.

An injunction has been described as the most extraordinary power exercisable by a court of equity.

> There is no power the exercise of which is more delicate, which requires greater caution, deliberation, and sound discretion or more dangerous in a doubtful case, than the issuing [of] an injunction; it is the strong arm of equity, that never ought to be extended unless to cases of great injury, where courts of law cannot afford an adequate or commensurate remedy in damages. The right must be clear, the injury impending or threatened, so as to be averted only by the protecting, preventive process of injunction; but that will not be awarded in doubtful cases, or new ones, not coming within well-established principles; for if it issues erroneously, an irreparable injury is inflicted, for which there can be no redress, it being the act of the Court, not of the party who prays for it.

Bonapart v. Camden & A.R. Company, 205 F. Cas. 217 (C.C.N.Y. 1830)(No. 1,617).

A. The Safeguards in Rule 1.610 Fla. R. Civ. Pro. Serve as a Check on the Injunctive Power of a Court.

Rule 1.610 of the Florida Rules of Civil Procedure (hereinafter "Rule 1.610"), like its federal corollary Rule 65(d), limits the jurisdiction of a court to issue or enforce an injunction by providing that an injunction binds only "the parties to the action,

their officers, agents, servants, employees, attorneys and those persons *in active concert* or participation with them who receive actual notice of the injunction."[4] (emphasis added.)

The legislative history of Rule 65(d) Fed. R. Civ. P. (hereinafter "Rule 65(d)") makes plain the impropriety of the Florida Supreme Court's decision affirming the constitutionality of the injunction. The rule is drawn from the Clayton Act. *See* Legislative Commentary to Rule 65(d). The Clayton Act was enacted to curtail abuses of federal strike injunctions by "legislation directed to those specific matters which have given rise to the most criticism." H.R. Rep. No. 612, 62d Cong. 2d Sess. 1 (1912). Section 19 of the Act, from which Rule 65(d) is drawn, was designed as a "safeguard" to prevent the issuance of "blanket" injunctions in which large numbers of people could be punished for breaching injunctions issued in cases to which they had not been made parties. *Id.* at 4. The report observed that the language now contained in Rule 65(d) is the proper rule, but unfortunately it was not uniformly observed. *Id.* at 5-6. As an example, the report cited *United States v. Debs*, 64 F. 724 (N.D. Ill. 1894) which involved criminal contempts convictions from the Pullman strike, and observed "much of the criticism which arose from the *Debs* case was due to the fact that the Court undertook to make the order effective not only upon the parties to the suit and those in concert with them, but upon all other persons whomsoever." *Id.* at 6. Thus, with large, divisive and often violent labor strikes in mind, Congress *intentionally* re-

[4] The relevant portion of Rule 1.610 Fla. R. Civ. Pro. is as follows:

(c) Form and Scope. Every injunction shall specify the reasons for entry, shall describe in reasonable detail the act or acts restrained without reference to a pleading or another document and shall be binding on the parties to the action, their officers, agents, servants, employees and attorneys and on those persons in active concert or participation with them who receive actual notice of the injunction.

stricted the contempt power of courts to the confines now expressed in Rule 65(d).[5]

As the late Judge Learned Hand pointed out in *Alemite Mfg. Corp. v. Staff*, 42 F. 2d 832, 833 (2d Cir. 1930):

> It [a court] cannot lawfully enjoin the world at large, no matter how broadly it words its decree. If it assumes to do so, the decree is *pro tanto brutum fulmen* [sound and fury signifying nothing], and the persons enjoined are free to ignore it. It is not vested with sovereign powers to declare conduct unlawful; its jurisdiction is limited to those over whom it gets personal service, and who therefore have their day in court. Thus, the only occasion when a person not a party may be punished is when he has helped to bring about, not merely what the decree has forbidden, because it may have gone too far, but what it has the power to forbid, and act of a party. This means that

[5] The injunction in this case is not analogous to an injunction issued against a labor union. Such an injunction binds the union named in the lawsuit, and extends to its members because they are legally identified with it. E.g. *Backo v. Local 281, United Brotherhood of Carpenters and Joiners*, 438 F. 2d 176, 181 (2d Cir. 1970). However, when a court restricts the picketing activity of a union, that decree does *not* bind another union whose members wish to picket, or anyone else who acts independently of the union enjoined. *See Berger v. Superior Court of Sacramento County*, 167 P. 143 (Cal. 1917)(Supreme Court of California reversed the contempt conviction of a non-party even though he had received notice of the injunction, because there was neither an allegation nor evidence to establish that he was a member of the union enjoined); *In re: Wholesale Licensed Alcoholic Beverages Salesman's Union*, 6 A. 2d 660 (Court of Chancery N.J. 1939)(contempt convictions of salesmen reversed because they were not confederates or aiders or abetters of the enjoined distillery union, even though they did "an act of the same character of that which the [union enjoined][was] forbidden to commit.") In stark contrast to these narrow injunctions, the injunction at issue in the instant case was against all persons picketing, patrolling, demonstrating, etc. within the thirty-six foot buffer zone.

> the respondent must either abet the defendant, or must be legally identified with him . . . this is far from being a formal distinction; it goes deep into the powers of a Court of Equity . . . it is by ignoring such procedural limitations that the injunction of a Court of Equity may by slow steps be made to realize the worst fears of those who are jealous of its prerogative.

Alemite Mfg. Corp. v. Staff, 42 F. 2d 832, 832-33 (2d Cir. 1930).

Accordingly, the Court in *Alemite* reversed the contempt conviction of the non-party respondent who was not legally identified with or an aider or abetter of a party enjoined.

Following *Alemite*, this Court held in *Chase National Bank v. City of Norwalk, Ohio*, 291 U.S. 431, 437, 54 S. Ct. 475, 477 (1934) that the district court erred by "extending the injunction to all persons to whom notice of the injunction should come." It observed:

> [I]t is true that persons not technically agents or employees may be specifically enjoined from knowingly aiding a defendant in performing an act if their relation is that of associate or confederate. Since such persons are legally identified with the defendant and privy to his contempt, the provision merely makes explicit as to them that which the law already implies. But by extending the injunction to "all persons to whom notice of the injunction should come," the District Court assumed to make punishable the conduct of persons who act independently and whose rights have not been adjudged according to law . . . to subject them to such peril violates established principals of equity jurisdiction and procedure.

B. The Florida Supreme Court's Affirmance of the Injunction Is at Odds with Well-Settled Precedent Governing the Injunctive Power of a Court Over Non-Parties.

The law of *Alemite* and *Chase* is uniformly followed by courts construing the language of Rule 65(d).[6] The Florida Supreme Court's decision in this case marks a dangerous and unprecedented departure from this line of authority, and undermines the safeguards extant in this rule. Without such a check on a court's power to issue and enforce injunctions, strangers who, without notice, happen into a "buffer zone" do so at peril of arrest and incarceration.

[6] See e.g., *Regal Knitwear Co. v. National Labor Relations Board*, 324 U.S. 9, 13, 65 S. Ct. 478, 89 L. Ed. 661, 666 (1945)(Courts "may not grant an enforceable order or injunction so broad as to make punishable the conduct of persons who act independently and whose rights have not been adjudged according to the law"); *Swetland v. Curry*, 188 F. 2d. 841, 843 (6th Cir. 1951)(a non-party "may not be held guilty of contempt for violating an injunction unless he is shown to be identified with or is an aider or abetter of the party enjoined"); *Kean v. Hurley*, 179 F. 2d 888, 190 (8th Cir. 1950)("persons who are not parties to the injunction or in privity with them . . . are not bound by the decree and cannot be held liable for acts done contrary thereto even though the decree assumes to bind them"); *Petersen v. Fee International, LTD*, 435 F. Supp. 938, 942 (W.D. Okl. 1975) (Rule 65(d) follows the common law rule that non-parties are bound by an injunction only if they are legally identified with a named party or aided or abetted the named party in his violation of the decree); *Wright v. County School Board of Greensville County, Va.*, 309 F. Supp. 671, 677 (E.D. Va. 1970) (Rule 65(d) fixes the scope of valid injunctions, and terms in a decree exceeding the rule are of no effect; non-parties who act independently are not subject to sanctions); *Chisolm v. Caines*, 147 F. Supp. 188, 191 (E.D.S.C. 1954)("Injunction cannot issue and bind the public at large" even though it purports to do so); *Baltz v. The Fair*, 178 F. Supp. 691, 693 (N.D. Ill. 1959)("Persons who are not parties to the injunction or in privity with them . . . are not bound by the decree insofar as it operates in person and cannot be held liable for acts done contrary to its terms"); *Baltimore Transit Company v. Flynn*, 50 F. Supp. 382, 386 (D. Md. 1943)(A court "cannot lawfully enjoin the world at large"). Each of these cases holds that terms in an injunction exceeding Rule 65(d) are void.

II. Constitutional Doctrines of Procedural Due Process and Jurisdiction Prohibit a Court from Punishing as Contempt the Acts of Non-Parties When There is Neither an Allegation nor a Finding that They Are Legally Identified With, or Aiders and Abetters of, a Party Properly Enjoined.

Embodied in Rule 65(d) and Rule 1.610 is the principle that an injunction violates due process rights when it "assume[s] to make punishable the conduct of persons who act independently and whose rights have not been adjudged according to the law." *Regal Knitwear*, 324 U.S. 9, 13; *Chase*, 291 U.S. at 437.

Thus, the injunction issued in this case is void because it violates principles of procedural due process and jurisdiction which require that a person be given notice of litigation and an opportunity to be heard *before* an injunction can issue against him. Rule 65(d) permits injunctions to be enforced against named parties whose rights have been lawfully adjudicated. It also reaches persons legally identified with the enjoined party (agents, etc.) to prevent him from circumventing the decree through persons acting under his control. Finally, Rule 65(d) reaches persons who aid and abet the named party in his violation of the injunction[7] and who thereby help "to bring about, not merely what the decree forbids, because it may have gone too far, but what is has the power to forbid, the act of a party." *Alemite*, 42 F. 2d at 833. The inclusion of these latter categories of contemnors comports with doctrines of procedural due process because such individuals are asserting the interests of the named party whose rights have been adjudicated.

Moreover, the constitutional infirmity of the injunction in the case *sub judice* is not cured merely through the provision of notice to the non-party actors. The fallacy of such reasoning

[7] The case law cited in fn. 5 uniformly construes "acting in active concert or participation" to mean "aiding and abetting the named party in his violation of the decree."

was effectively addressed in the somewhat analogous case of *State University of New York v. Denton*, 316 N.Y.S. 297 (4th App. Div. 1970). There, the plaintiffs, a state university, sought and obtained an injunction in the context of a series of violent campus disturbances. The injunction prohibited the named student defendants and "anyone who received notice of the injunction" from interfering with the operation of the university. *Id.* at 298. Subsequently, a group of forty-five university professors who had not been named as parties in the underlying action were convicted of contempt for staging a sit-down strike in the office of the university's president. In reversing the contempt convictions, the New York Appellate Court (after a thorough analysis of applicable law) stated, "The threshold question to be considered, therefore, is whether appellants were bound by the order of March 5, which was addressed to the named student defendants and 'all persons have knowledge' of the order, and whether, accordingly appellants may be guilty of criminal contempt for its violation. Well-settled principals of law require a negative answer to the inquiry." *Id.* at 300.

The *Denton* Court explained that notice of an injunction to "a non-party alone is not sufficient without proof of agency or collusion with named defendants to impose liability for a violation," *Id.* at 301, "and that the mere fact that an actor *may be sympathetic to the desires of one properly bound* by an injunction, or that by his conduct the former accomplishes what the party enjoined wants accomplished, is not sufficient to establish beyond a reasonable doubt that the conduct was carried out in combination or collusion with the named enjoinee." *Id.* at 302 (emphasis added).

III. The Anti-Speech Injunction Constitutes a Prior Restraint Upon Protected Free Speech and is Otherwise Unconstitutional Because of Its Content-Based Discriminatory Effect.

The power of the State to abridge freedom of speech on a public sidewalk has been limited by this Court's repeated pronouncements. These form a core constitutional value woven throughout the fabric of First Amendment doctrine. *See Edwards v. South Carolina*, 372 U.S. 229, 83 S. Ct. 680, 9 L. Ed. 697 (1963); *Saia v. New York*, 334 U.S. 558, 68 S. Ct. 1148, 92 L. Ed. 1574 (1948); *Kunz v. New York*, 340 U.S. 290, 71 S. Ct. 312, 95 L. Ed. 280 (1951); *United States v. Grace*, 461 U.S. 171, 103 S. Ct. 1702, 75 L. Ed. 2d 736 (1983). The Florida Supreme Court's strained application of *Frisby v. Schultz*, 487 U.S. 474, 108 S. Ct. 2495, 101 L. Ed. 2d 420 (1988) stands in blatant contravention of these well-settled pronouncements.

A. The Florida Supreme Court Grossly Exaggerated the Scope of this Court's Holding in *Frisby*.

The Court's reliance on *Frisby* as a justification for criminalizing pure speech activity on a busy thoroughfare is a distortion of this Court's narrow holding in that case. As was emphasized again in *Frisby*, the beginning point of inquiry in a free speech case is the "place" or "forum" where the expressive activity takes place. "'[T]ime out of mind'" public streets and sidewalks have been used for public assembly and debate, the hallmarks of a traditional public forum." *Frisby*, 108 S. Ct. at 2499 (citing *Hague v. CIO*, 307 U.S. 496, 515, 59 S. Ct. 954, 963-64, 83 L. Ed. 1423 (1939). And as this Court was careful to point out, this phrase is not a mere "cliche," and "stringent standards" must be applied to any governmental attempt to restrict free speech in such public fora. *Id.* at 2500.

The key distinction between the activity enjoined in the case *sub judice* and that involved in *Frisby* is obvious, as was expressly recognized by this Court: "In such cases 'the flow of

information [is not] into . . . household[s], but to the public.'" *Frisby*, 108 S. Ct. at 2503 (citing *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 420, 91 S. Ct. 1575, 1578, 29 L. Ed. 2d 1 (1971). This Court further stated: "The type of picketers banned by the Brookfield Ordinance generally do not seek to disseminate a message to the general public, but to intrude upon the targeted resident . . ." *Id.* at 2503.

As a consequence of the Florida Supreme Court's exaggeration of the holding in *Frisby*, the power of the State to abridge protected pure speech is greatly expanded. Such a precedent, if allowed to stand, will have a pronounced effect on legitimate, peaceful speech activity.

B. The Florida Supreme Court Failed to Properly Differentiate Between "Non-Speech" and "Anti-Speech" in its Analysis of Viewpoint and Content-Based Discrimination.

This Court held in *Forsyth County, Georgia v. The Nationalist Movement*, 113 S. Ct. 40, 121 L. Ed. 2d 11 (1992), "[r]egulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment." (citing *Regan v. Time, Inc.*, 468 U.S. 641, 648-649 (1984). It is therefore imperative that content-based regulation of speech undergo the strictest of constitutional scrutiny. This jurisprudential rule is based on the presupposition of equality of all speech, regardless of how provocative or controversial. *Texas v. Johnson*, 109 S. Ct. 2533, 2542 (1989). As this Court has stated, the "essence" of content neutrality simply commands that the "regulation of communication may not be affected by sympathy or hostility for the point of view being expressed by the communicator." *Young v. American Mini Theatres*, 427 U.S. 50, 65 (1976).

While *Young* marked a departure from the absolute protection against all forms of discriminatory regulation of speech enunciated in *Chicago v. Mosely*, 408 U.S. 92, 95-96 (1972),

the critical distinction lies in what may be termed "non-speech" restrictions and "anti-speech" restrictions. This dichotomy may be illustrated by contrasting the injunctions at issue in *Mosely* and *Young*.

The nonpicketing regulation in *Mosely* was aimed at preventing disruptions of school activities. The mere fact that picketing occurs in the vicinity of a school, during school hours, can be disruptive irrespective of the message conveyed. However, such an injunction is intended to prevent disruptions of school activities. Therefore, the ordinance in *Mosely* constituted a non-speech restriction. Such restrictions are, of necessity, content neutral, since the message being conveyed is immaterial; it is the expressive activity itself which is forbidden.[8]

By contrast, when a restriction is anti-speech, as was the case in *Young*, then the speech restriction may apply only to certain subject matters and not to other communications.[9] Anti-speech restrictions are presumptively invalid, while non-speech restrictions are presumptively valid. *See generally*, Nimmer, M., Nimmer On Freedom Of Speech § 2.07 (1989). This point

[8] Another recent example is found in the case of *Clark v. Community for Creative Non-Violence*, 104 S.Ct. 3065, 3070 (1984)(upholding the constitutionality of a Park Service regulation prohibiting overnight sleeping in Lafayette Park or the Mall in Washington D.C., even in connection with a demonstration in support of the homeless, on the grounds that "[t]he requirement that the regulation be content neutral is clearly satisfied.").

[9] However, Justice Stevens has taken the position that even if a subject-matter restriction is otherwise permissible, it may nonetheless be unconstitutional if it restricts expression which is controversial in nature. Such restrictions are in his opinion unconstitutional *per se* since "the use of the 'controversial' nature of speech as the touchstone for its regulation threatens a value at the very core of the First Amendment, the 'profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open.'" *Consolidated Edison Co. v. Public Service Commission*, 447 U.S. 530, 548 (1980)(Stevens, J., concurring).

is best illustrated in *Consolidated Edison Co. v. Public Service Commission*, 447 U.S. 530 (1980), where this Court recognized the validity of subject matter differentiation in connection with anti-speech restrictions (there, monthly inserts in electric bills which contained "opinions or viewpoints on controversial issues of public policy), but nevertheless invalidated the restriction in that case as not serving a "compelling state interest."[10]

Viewpoint neutrality is an absolutely essential component of all anti-speech injunctions. While the distinction between "subject matter neutrality" and "viewpoint neutrality" is not always readily apparent, this Court has repeatedly recognized and reaffirmed the requirement that viewpoint neutrality must always exist — even in cases where the subject matter neutrality is not required. *Regan v. Time, Inc.*, 104 S.Ct. 3262, 3271 (1984); *Cornelius v. NAACP Legal Defense & Educational Fund*, 105 S.Ct. 3439, 3454 (1985); *Pacific Gas & Electric. v. P.U.C. of California*, 106 S.Ct. 903, 910-11 (1986); *City of Renton v. Playtime Theatres, Inc.*, 106 S.Ct. 925, 929 (1986); *American Booksellers Ass'n v. Hudnut*, 771 F.2d 323 (7th Cir. 1985), *aff'd* 106 S.Ct. 1172 (1986).

The Florida Supreme Court blurred the distinction between non-speech restrictions and anti-speech restrictions. In upholding an injunction which admittedly bans only pro-life speech activity, the court applied a nonspeech rationale to the setting, finding, in essence, that all speech that is *perceived as pro-life* and occurring within 36 feet of an abortion clinic is *per se* disruptive. Thus, under the Court's flawed reasoning, the mere fact that the injunction "make[s] no mention whatsoever of abortion", it is content-neutral.

The obvious danger inherent in such a broad, sweeping approach to injunctions regulating speech is that by merely using

[10] See also *Widmar v. Vincent*, 454 U.S. 263 (1981); *Carey v. Brown*, 447 U.S. 455, 465 (1980)(content-based distinction permissible only where there is a compelling state interest).

care not to mention any specific category of speech, a court may nonetheless, through arbitrary restrictions, control or chill expression of a particular disfavored viewpoint. The Court's colloquy from the contempt hearing of April 13, 1993, clearly demonstrates this dynamic in operation in the instant case. (*See supra* pp. 3-4.)

CONCLUSION

The "buffer zone" created by the trial court in this case has been elevated by the Florida Supreme Court to a kind of constitutional "no man's land." The very notion that peaceful expression in a quintessential public forum may be selectively banned, and its exercise criminalized, due *solely* to the particular viewpoint expressed is itself anomalous. But the application of such a legislative decree to all persons "perceived" as advocating the judicially declared subversive view, regardless of whether they are "*in active concert*" with a party to the action, is tyranny in its purest form. In the interest of preserving the dignity of the fundamental constitutional rights at stake, as well as the procedural safeguards which serve as a check on such a tyrannical abuse of authority, the decision below must be reversed.

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NO. 93-880

IN THE

Supreme Court Of The United States

October Term, 1993

JUDY MADSEN, *et al.*,
Petitioners,

v.

WOMEN'S HEALTH CENTER, INC., *et al.*,
Respondents.

On Writ of Certiorari
To The Supreme Court of Florida

BRIEF FOR THE SOUTHERN CENTER FOR LAW & ETHICS, CARE NET, BIRMINGHAM 1000 FOR LIFE, INC., CONNIE CRITTENDEN, AND GINNY SHIRLEY, AMICI CURIAE IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI CURIAE

The Southern Center for Law and Ethics is a nonprofit, publicly funded, tax-exempt corporation founded in 1985 and based in Birmingham, Alabama. Paramount to the Center's purpose is to develop an understanding of the relationship between law and religion. The Center's activities include interaction and instruction with interested law students,

lawyers, and members of the academic community, publication of articles and a journal of theology and law, providing legal counsel and filing *amicus curiae* briefs on a variety of public issues, from the free speech rights of college professors to the legal status of midwives, related to the Center's purpose.

The Center is interested in protecting the First Amendment free speech rights of those individuals who engage in peaceful, lawful speech and assembly in front of and near abortion clinics. The Center is also interested in ensuring that women considering abortion have the opportunity to receive and respond to offers of assistance, care, and information that can assist some of them in choosing childbirth.

Care Net is a ministry of the Christian Action Council, a nonprofit, charitable organization, founded in 1975 and incorporated in the District of Columbia. Care Net trains pregnancy care center workers, church members, and individuals to provide practical and compassionate care to women in unplanned pregnancies. The over 450 Care Net pregnancy care centers in the United States and Canada offer free pregnancy tests; birth, abstinence, and post-abortion counseling; housing; parenting classes; and help with financial, medical, and material needs. Studies have shown that a majority of women who have chosen abortion would have preferred positive alternatives and Care Net pregnancy care centers offer women these alternatives. Were it not for the non-coercive assistance offered by sidewalk counselors, some women would never learn about the help that is available. Thus, Care Net believes that restricting the speech of sidewalk counselors would deny women access to information they need to make informed and reasoned decisions.

The Birmingham 1000 for Life, Inc., is a nonprofit, charitable organization whose purpose is to provide financial assistance for obstetric and hospital care to those who have been abortion-minded and have lacked either medical insurance or the means to pay for obstetric and hospital care. The Birmingham 1000 for Life, Inc., has also published and provided educational material on abortion risks, fetal development, and prolife alternatives to abortion. The Birmingham 1000 for Life, Inc., is particularly concerned that sidewalk counselors have the opportunity to lawfully and peacefully offer women considering abortion the assistance, care, and information that Birmingham 1000 for Life, Inc., provides.

Connie Crittenden and Ginny Shirley are individuals who have, on a volunteer basis, engaged in peaceful and lawful sidewalk counseling. These individuals wish to maintain their First Amendment rights to lawfully and peacefully offer pregnant women considering abortion assistance, care, and information that will enable some of them to choose birth, and life, for their unborn children.

Counsel for all parties have consented to the filing of this brief.

SUMMARY OF ARGUMENT

Upholding the three-hundred foot ban on approaching and thirty-six foot buffer zone would have the effect of destroying, on a national scale, the practice of sidewalk counseling. Sidewalk counseling constitutes an offer of assistance, care, and information directed to pregnant women and their companions in the vicinity of an abortion clinic. The amended injunction's three-hundred foot ban on approaching and thirty-six foot buffer zone make it impossible for sidewalk counselors to reach women with this offer, and hence constitutes a ban on this peaceful form of expression and assistance.

The Florida Supreme Court erroneously held that a ban on sidewalk counseling was constitutionally permissible because sidewalk counseling is directed at particular clinic patients rather than the general public. Women considering abortion, however, are not a captive audience. The rights of such women to refuse the information, counseling, and assistance offered by sidewalk counselors can be secured simply by ensuring women the basic right of ingress and egress to and from the clinics. Words addressed to a particular person are as much within the free speech clause as a picket sign addressed to the general public.

The amended injunction destroys the free speech rights of all prolife individuals based on alleged wrongdoing by a few. The amended injunction applied to several associations or campaigns, to six named individuals, and to "all persons acting in concert or participation with them . . . ." The amended injunction was applied by police and the trial judge to prolife individuals, and only prolife individuals, regardless of whether those prolife individuals had violated the original injunction, committed any wrongful acts, or knew or were involved with any of the named individuals. The amended injunction could not have been limited to those who had violated the original injunction, as the judge generally failed to identify those persons who had violated the original injunction. The amended injunction in practice defined all prolife individuals in the vicinity of the clinic as "acting in concert or participation" with those subject to the injunction.

The weak factual and evidentiary foundation of the injunction invites similar injunctions at abortion facilities around the country. The trial judge did not find a single instance of a clinic blockade. The problems of noise and congestion were found by the trial judge to have been produced by both sides, and yet the judge only enjoined the activities of prolife individuals and associations. The trial judge improperly relied on offensive, but constitutionally-protected speech. The trial judge incorrectly relied on the statements of a staff physician claiming that prolife speech caused higher levels of anxiety and hypertension. The attorney for the prolife individuals was denied access to the names and medical records of the clinic patients who allegedly suffered these negative consequences, and thus lacked any effective means to confront or cross examine this witness, who was an employee or contractor of the clinic seeking the injunction. Justifying prohibitions of prolife speech with the generalized testimony of abortionists that such speech has negative "health" effects or causes "anxiety" is inconsistent with this Court's allowance of informed consent statutes. *See Casey*, 112 S. Ct. at 2822-26.

Sidewalk counseling is closely associated with the broader movement of prolife individuals and groups offering services to pregnant women and their children. The service segment of the prolife movement offers counseling, pregnancy tests, housing, medical care, clothing, furniture, legal assistance, and other forms of aid to approximately 700,000 women each year. Sidewalk counseling for many women serves as a point of entry to the services offered by the local prolife agencies, and it is these services which enable many women to choose childbirth over abortion.

Sidewalk counseling most often exists completely independently of either clinic blockades or legal protests, largely because sidewalk counselors believe that it is easier to approach women under calmer circumstances. The methodology of sidewalk counseling is generally to be friendly, helpful, and nonoffensive. Sidewalk counselors are sustained in their efforts by a steady stream of women who respond positively to their offers of assistance, care, and information, and who are often quite grateful to the sidewalk counselors for reaching them when they were on the verge of aborting.

This Court has recognized that prolife speech addressed to women considering abortion can further the liberty and health of pregnant women. *See Casey*, 112 S. Ct. at 2821-26 (prolife speech can avoid "devastating psychological consequences" of discovering "impact on the fetus" after abortion, and can ensure a "more informed and deliberate" exercise of woman's liberty). This Court has correctly assumed that abortion counseling as practiced in abortion clinics typically fails to apprise clients of information which most women would find morally relevant to the abortion decision. The amended injunction forbids *private* parties located on a public forum from engaging in a kind of speech that this Court permits even to the *government within* the abortion clinic.

ARGUMENT

I. Upholding the Three-Hundred Foot Ban on Approaching and Thirty-Six Foot Buffer Zone Would Have the Effect of Destroying, on a National Scale, the Practice of Sidewalk Counseling.

A. The Amended Injunction was Specifically Directed Against the Practice of Sidewalk Counseling.

The trial court's amended injunction enjoined, in an area within three-hundred feet of the clinic, prolife individuals from "physically approaching any person seeking the services of the Clinic unless such person indicates a desire to communicate by approaching or by injuring [sic] of the respondents."[1] The amended injunction referred to this "desire to communicate" as an "invitation" to the form of communication called "sidewalk counseling."[2] The amended injunction also prohibited sidewalk counseling "within the 36 foot buffer zone" even if desired and invited by the client.[3]

B. The Amended Injunction Made Sidewalk Counseling Impracticable.

The essence of sidewalk counseling, as described in detail in section II of this brief, *infra*, is an attempt to reach women considering abortion with an offer of emotional, spiritual, and material assistance toward choosing birth over abortion, and with information relevant to the abortion decision. The methodology of sidewalk counseling is to approach pregnant women in the vicinity of the abortion facility in a friendly, nonthreatening manner. Toward this end, sidewalk counselors generally do not carry picket signs, sing, shout, or otherwise engage in demonstrative behavior directed at the general public. *See* section II, *infra*.

It is impossible to sidewalk counsel without approaching the clinic's potential clients, because the essence of sidewalk

[1] *See Operation Rescue v. Women's Health Center, Inc*, 626 So. 2d 664, 680 (1993).

[2] *Id.*

[3] *See id.*

counseling is an intervention that involves an offer of information and assistance. The portion of the injunction forbidding "approaching" therefore effectively forbids sidewalk counseling. If the trial judge envisioned that women approaching the clinic would have the opportunity either to accept or refuse sidewalk counseling, then the trial judge erred either in writing the injunction or in his understanding of sidewalk counseling. Since sidewalk counselors are not demonstrating against abortion, it would be difficult or impossible for women passing near them to know who they were or what they intended to offer. It is vain to expect that sidewalk counseling can exist without sidewalk counselors "approaching" potential clinic clients.

The 36 foot buffer zone effectively prohibits sidewalk counseling in the immediate vicinity of the clinic, even if invited and desired by potential abortion clients. This ban interferes with the free speech rights of sidewalk counselors *and* women considering abortion.

The alternative of sidewalk counseling beyond the three-hundred foot zone is impracticable, because at such a distance it cannot be determined whether vehicles or pedestrians are going to the abortion facility. This destroys the essence of sidewalk counseling, which is an offer of information and assistance to women considering abortion, rather than a generalized protest against abortion.

C. The Decision of the Florida Supreme Court Affirming the Amended Injunction's Ban on Sidewalk Counseling Erroneously Held That Such Ban Was Constitutionally Permissible Because Sidewalk Counseling is Directed at Particular Clinic Patients Rather Than the Public at Large.

The Florida Supreme Court interpreted this Court's holding in *Frisby v. Schultz*, 487 U.S. 474 (1988), to permit a ban on "picketing . . . directed at particular Clinic . . . patients."[4] This holding is both factually and legally erroneous. First, it is

[4] *Id.* at 672.

factually erroneous to include sidewalk counseling within the broader category of "picketing." Sidewalk counselors generally do not march, hold signs, sing, or yell, but rather attempt to offer information and assistance to women considering abortion. Second, women considering abortion are not a "captive" audience, and thus the rationale of *Frisby* permitting a ban on "targeted" picketing is inapplicable. The rights of such women to refuse the information, counseling, and assistance offered by sidewalk counselors can be secured simply by ensuring women the basic right of ingress and egress to and from the clinics. Third, even in *Frisby* the Court permitted the prolife message to be given to residents within homes by walking in front of a group of homes; only "targeted" picketing in front of only one home could be banned. The injunction at issue in this case, by contrast, forbids all communication and even presence within the 36 foot zone, even if invited and desired by the pregnant women, and effectively destroys sidewalk counseling by banning "approaching" within 300 hundred feet.

The rationale of the Florida Supreme Court implies that the free speech clause of the Constitution does not protect, or protects with significantly less rigor, even peaceful, nonthreatening speech directed at particular individuals. If freedom of speech is to be a meaningful right, however, it must include the right to address particular individuals, or classes of individuals. Surely words addressed to a particular person, whether friend, neighbor, or stranger, are as much within the free speech clause as a picket sign addressed to the general public.

If this Court accepts the Florida Supreme Court's rationale, it would mean that sidewalk counseling as a form of speech would receive little or no constitutional protection. This rationale would be used by abortion clinics to bring an end to sidewalk counseling.

D. The Amended Injunction Destroys the Free Speech Rights of All Prolife Individuals Based on Alleged Wrongdoing by a Few.

The amended injunction was based on a finding that a prior injunction protecting ingress to the abortion facility had been violated. The trial court's findings, however, generally failed to identify the persons responsible for violating the prior injunction.[5] Moreover, the noise and congestion found objectionable by the trial court were produced by both prolife and prochoice individuals,[6] and yet the amended injunction only applied to prolife individuals.

The amended injunction applied to several associations or campaigns, to six named individuals, and to "all persons acting in concert or participation with them . . . ."[7] The amended injunction was applied by the police and trial judge to prolife individuals, and only prolife individuals, regardless of whether those prolife individuals had violated the original injunction, committed any wrongful acts, or knew or were involved with any of the named respondents.[8] Indeed, the amended injunction could not reasonably have been limited to those who had violated the original injunction, given the fact that the trial judge, despite receiving substantial evidence, had generally failed to identify those who had violated the original injunction. The Eleventh Circuit found that persons were "designated for arrest by clinic workers and police officers because they were perceived to be 'pro-life.'"[9] Thus, in practice the amended injunction defined all pro-life individuals in the vicinity of the abortion clinic as "acting in con-

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[5] Respondent Cadle was essentially the only person identified as engaging in specific activity. By contrast, the trial court would not even assert that all of the named respondents were present within the vicinity of the clinic. *See Operation Rescue*, 626 So. 2d at 677 (crowd included "some of the named respondents").

[6] *Operation Rescue*, 626 So. 2d at 677 (finding B on composition of crowd); *id.* (finding C on noise).

[7] *Operation Rescue*, 626 So. 2d at 679.

[8] *Cheffer v. McGregor*, 6 F.3d 705, 711 & n.11 (11th Cir. 1993).

[9] *Cheffer*, 6 F.3d at 711 n.11.

cert or participation" with the respondents. To be prolife, and to be present near the clinic, was to be guilty.[10]

Thus, the amended injunction effectively banned peaceful, non-threatening acts by all prolife individuals, including sidewalk counselors, based on alleged wrongdoing by a few.

E. The Weak Factual and Evidentiary Foundation Of the Amended Injunction Invites Similar Injunctions at Abortion Facilities Around the Country.

The factual and evidentiary foundation of the amended injunction is surprisingly weak, given the extreme breadth of the enjoined activities. The judge did not find a single instance of a clinic blockade, or of a patient or employee of the clinic being unable to enter or leave the facility. The trial judge objected to the noise volume of the "gatherings" in front of the clinic, but noted that the shouting, yelling, and boom boxes were employed by persons of both sides.[11] The trial judge complained that the crowds slowed vehicular traffic passing by and into the clinic property, but noted that the crowds consisted of persons on both sides of the abortion issue, as well as police and media.[12] Thus, the overall problems of noise and congestion were produced by both sides, and yet the judge only enjoined the activities of prolife individuals and associations. The activities found objectionable by the judge did not actually prevent ingress or egress to the abortion facility, and the judge was not concerned enough with noise and congestion to stop all persons, regardless of ideology, from engaging in disruptive activities.

[10] This conclusion is underscored by the trial court's finding that the crowd included "some of the named respondents in this cause; some persons who were loosely associated with the respondents' organizations, Operation Rescue and Operation Goliath." *Operation Rescue*, 626 So. 2d at 677 (finding B). The trial court failed to articulate what it meant to be "loosely associated" with the respondent organizations, and failed to include as persons present those who were prolife but had no association with the respondent organizations. Thus, the trial court appeared to assume that all prolife persons present in the vicinity of the clinic were somehow associated with or in concert with the respondent individuals and/or associations, and thus were somehow responsible for alleged violations of the injunction.

[11] *Operation Rescue*, 626 So. 2d at 677 (finding C).

[12] *Id.* at 677.

The trial court was offended by a few particularly strong statements made to clinic workers and others. Such statements included invoking "the wrath of God by shouting, 'I pray that God strikes you dead now;'" "providing literature identifying the clinic employee as a 'baby killer;'" and shouting "child murderer" and "baby killer" to the abortionist.[13] However offensive such speech might be (even to many prolife individuals), it seems well within the kinds of offensive speech protected by this Court in *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982). Thus, much of what the judge cited as supportive of the amended injunction consisted of constitutionally protected speech that appeared to offend abortion personnel and the judge. This willingness to enjoin constitutionally-protected speech offensive to the judge is itself constitutionally offensive. As this Court stated in *Claiborne Hardware*, 458 U.S. at 911:

> Petitioners were engaged openly and vigorously in making the public aware of respondent's . . . practices. Those practices were offensive to them, as the views and practices of petitioners are no doubt offensive to others. But so long as the means are peaceful, the communication need not meet standards of acceptability.

If this Court accepts as adequate to support the amended injunction the findings of the trial court, it will invite clinics and judges throughout the nation who are similarly offended to selectively enjoin prolife speech.

The most significant finding of the trial court in support of the injunction was the trial court's recitation of possible damage to the health of clients. The trial court stated:

> This [staff] physician . . . testified that he witnessed the demonstrators running along side of and

[13] *Id.*

> in front of patients' vehicles, pushing pamphlets in car windows to persons who had not indicated any interest in such literature. As a result of patients having to run such a gauntlet, the patients manifested a higher level of anxiety and hypertension causing those patients to need a higher level of sedation to undergo the surgical procedures, thereby increasing the risk associated with such procedures. The doctor also testified that the noise of singing, chanting, shouting and yelling could be heard through the walls of the clinic and caused stress in the patients during surgical procedures and while recuperating in the recovery rooms. The doctor also testified that he observed some patients turn away from the crowd in the driveway to return at a later date. He testified that such delay in undergoing the procedures also increased the risk associated therewith.[14]

First, it should be recognized that the testimony of a "staff physician" is not disinterested or unbiased, as such person is an employee or contractor of the clinic seeking the injunction. In addition, an abortionist would have a natural ideological antipathy toward prolife protestors. In the present case, the attorney for the prolife respondents was denied access to the names and medical records of the clinic patients who allegedly suffered these negative consequences. Thus, the attorney lacked any effective means to confront or cross examine this clearly hostile witness.[15] If clinics can obtain broad injunctions based on the unsubstantiated conclusions and allegations of their medical personnel that protests caused negative health effects, then virtually every clinic in the nation will obtain such injunctions.

In the present case, the bias of the physician is illustrated by his characterization of sidewalk counselors as "pushing

[14] *Id.* at 678 (finding I).

[15] Hearing Record, at 31-39, 88-99, *Women's Health Center, Inc. v. Operation Rescue*, Circuit Court of the Eighteenth Judicial Circuit in and for Seminole County, Florida, March 22, 1990 (Testimony of Dr. Frank Snydle).

pamphlets in car windows."[16] The trial judge more neutrally described sidewalk counselors as "attempting to get the attention of the vehicles' occupants to give them anti-abortion literature and to urge them not to use the clinic's services."[17] Such bias is particularly important, as a slight recharacterization or distortion of prolife activities can make innocuous activities appear sinister or threatening. A smile can be described as a "grimace," or an offer of assistance described as an "intrusion."

Second, the physician's testimony that patients were harmed because they left to return at a later date, cannot be the basis of an injunction. Clinic ingress and egress was consistently available, so that the decision to leave was a voluntary reaction to the demonstrations. The fact that a demonstration induces some women to ponder the abortion decision for a longer time can hardly be the reason to enjoin such a demonstration. Public debate cannot be limited to moot issues, or issues that have no personal application. Even offensive speech can serve the positive function of making individuals treat the abortion decision with greater seriousness, to ensure that this irrevocable act is not regretted.

Third, the physician's testimony that prolife demonstrators caused some patients higher levels of anxiety and hypertension, requiring a higher level of sedation, is inadequate to enjoin such activity. Initially, it is difficult to know how the physician would know which activities caused these higher levels of anxiety. The trial judge had found that prochoice advocates were loud and confrontational, and that the local police had at times erected temporary barriers to separate "the partisan groups."[18] It seems likely that the tension and noise created by the confrontation between the opposing sides, rather than the actions of one side, would have produced the alleged higher levels of anxiety and hypertension. The abortion-physician would be highly unlikely to note the

[16] *Operation Rescue*, 626 So. 2d at 678 (finding I).

[17] *Id.* at 677 (finding E).

[18] *Id.* (finding D).

negative effects of his or her own partisans on clients. In addition, the physician's presumption that a higher level of anxiety is entirely negative echoes the view of this Court in *Thornburgh v. ACOG*, 476 U.S. 747, 762 (1986), that pregnant women should be protected from prolife speech which heighten their "anxiety." However, this Court in *Planned Parenthood v. Casey* was willing to accept the heightened anxiety which might accompany receipt of prolife speech, in order to avoid the "devastating psychological consequences," *id.* at 2823, of an ill-considered or uninformed abortion decision. Justifying prohibitions of prolife speech with the generalized testimony of abortionists that such speech had negative "health" effects is inconsistent with this Court's allowance of informed consent statutes. *See* section V, *infra*.

Fourth, this Court has repeatedly insisted that the Constitution protects even offensive speech. *See, e.g., Claiborne Hardware*, 458 U.S. at 911. Offensive speech must quite often produce "a higher level of anxiety." "Offensive," moreover, is in the eye of the beholder. A simple statement of truth—that abortion kills a live fetus—can be perceived as quite "offensive" to a physician in the business of performing abortions, or to a woman planning to undergo an abortion. To allow such offense to be repackaged as a "health" concern, and then used as a basis to enjoin prolife speech, would invite wholesale viewpoint-specific censorship of prolife speech.

It should be apparent to this Court that virtually every abortion facility could introduce testimony from their medical personnel to the effect that prolife speech has, in at least some instances, caused "a higher level of anxiety and hypertension" in some patients. Thus, if this Court holds such testimony to be an adequate foundation to support an injunction preventing sidewalk counseling, then sidewalk counseling will be virtually banned as an activity in America. Before this Court endorses such a serious diminution of free speech rights, it should seek to understand the nature of the speech that would be censored.

II. Sidewalk Counseling is an Attempt to Reach Women Considering Abortion with an Offer of Emotional, Spiritual, and Material Assistance Toward Choosing Birth over Abortion, and with Information Relevant to the Abortion Decision, and Therefore is Fundamentally Different from Protest Activities Directed at the General Public.

Sidewalk counseling can be defined as an offer of emotional, spiritual, and material assistance toward choosing birth over abortion, and of information relevant to the abortion decision, addressed to pregnant women and their companions within the vicinity of an abortion facility. The techniques of sidewalk counseling include: (1) the offering of services, including medical care, pregnancy tests, housing, infant and maternity clothing, and furniture, through referral to crisis pregnancy centers, physicians, and networks of prolife support; (2) expressions of care and concern for pregnant women, their unborn children, and their companions; and (3) the provision of information about abortion, alternatives to abortion, the particular abortion facility in question, and fetal development, through speech and literature distribution. The primary purpose of sidewalk counseling is to offer pregnant women considering abortion assistance, care, and information that will enable some to choose childbirth over abortion. A secondary purpose of sidewalk counseling is to offer assistance toward personal healing to women who choose to abort.

Sidewalk counseling must be carefully distinguished from both lawful protest activities, such as picketing, and from illegal protest activities, such as clinic blockades. Sidewalk counseling is not a protest activity, and its message is aimed primarily at women considering abortion, rather than the general public. Sidewalk counseling does not seek, as do clinic blockades, to forcefully prevent or delay women from aborting, but rather seeks to offer women assistance, care, and information that will enable some to choose voluntarily childbirth over abortion.

Sidewalk counselors generally view abortion as a self-destructive act for the woman, and therefore sincerely believe that they are assisting women by providing them with the services and information to enable them to avoid abortion. Sidewalk counselors also generally view abortion as the killing of an innocent human person, and hope through their assistance to the mother to save the life of the child. Sidewalk counseling therefore is generally described by its practitioners as a "service" or "ministry" to pregnant women and their children.

Sidewalk counseling is closely associated with the broader movement of prolife individuals and groups offering services to pregnant women and their children. The service segment of the prolife movement offers counseling, pregnancy tests, housing, medical care, clothing, furniture, legal assistance, and other forms of aid to approximately 700,000 women each year. This service is offered primarily through approximately 3,500 prolife agencies. There are several national networks of such agencies, the largest of which, Birthright, has existed since 1968; a number of the agencies, however, are independent. These agencies, whether independent or nationally affiliated, are primarily dependent on local support to supply the goods and services they offer. The philosophies and methods of these 3,500 local prolife agencies vary, but all of them represent an attempt to assist women and children through the provision of care, goods, and services. These 3,500 local agencies are primarily staffed by volunteers, a majority of whom are women.[19]

Sidewalk counseling serves as a bridge between local prolife service agencies and pregnant women considering abortion. Sidewalk counseling for many women serves as a point of entry to the services offered by local prolife agencies, and it is these services which in many instances enable pregnant women to choose childbirth over abortion.

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[19] *See* Frederica Mathewes-Green, *Unplanned Parenthood, Easing the Pain of Crisis Pregnancy*, Policy Review 28, 29 (Summer 1991) (describing prolife agencies and networks involved in offering services to women with crisis pregnancies).

Sidewalk counseling's intimate link with the service sector of the prolife movement contrasts with its ambivalent relationship to certain other sectors of the prolife movement. Although some sidewalk counselors have worked in concert with clinic blockades, many other sidewalk counselors disagree with the methods of Operation Rescue, or prefer not to be associated with clinic blockades. Although some sidewalk counselors sometimes work in concert with legal protests and picketing, many other sidewalk counselors avoid such links, or prefer to counsel in the absence of protests. Sidewalk counseling most often exists completely independently of either blockades or protests, largely because sidewalk counselors believe that it is easier to approach and counsel women under calmer circumstances. For example, one sidewalk counseling training manual explains that:

> Picketing is counter-productive to sidewalk counseling. Signs are usually a turn-off to a mother coming for an abortion, and she is less likely to take your literature or talk to you.[20]

Sidewalk counselors are often more frequent and regular in their activities than are protestors or those who blockade clinics. Sidewalk counselors wish to reach the particular women considering abortion and therefore attempt to be present at each local abortion clinic, in small groups, on the days when abortions are performed. Sidewalk counselors are generally volunteers who take time out from their other responsibilities to counsel in front of the clinics a few hours each week or month. Most sidewalk counselors are women, and a significant number are motivated, in part, out of their own negative experiences with abortion. Sidewalk counselors generally are loosely organized on a local basis to schedule, train, and protect one another. Sidewalk counselors who be-

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[20] Columbia Sidewalk Counseling Guidelines, 3-4. This booklet arises from the Columbia, South Carolina area but is "partially adapted from [the] Karen Black seminar." *Id.* (cover). Karen Black's approach to sidewalk counseling is used by sidewalk counselors in a variety of locations, including Birmingham, Alabama.

lieve their work to be hindered, rather than helped, by blockades or protests may nonetheless feel a duty to be present at such events, out of their generalized sense of obligation to ensure that someone is there "for the women and their babies." This may create the misperception that a local group of sidewalk counselors exists primarily as an adjunct to these more publicized protests. The truth is usually, however, that the sidewalk counselors have been consistently and quietly present at the clinics, but have only been noticed by the media when they are present on a day when a larger protest or clinic blockade occurs.

The methodology of sidewalk counseling is generally to be friendly, helpful, and nonoffensive. Thus, sidewalk counselors are instructed to "smile" because "people won't stop for a grump."[21] They are told not to "yell" because "[p]eople at a distance generally have a difficult time hearing you, and they will hear it as condemnation, even if you're saying something nice."[22] Similarly, sidewalk counselors are told not to "run toward a mother" because this is "very intimidating."[23] Sidewalk counselors are also instructed not to block clinic driveways.[24] However, sidewalk counselors often face the pressures of hostile abortion clinic staff, and paid or volunteer "clinic escorts," whose primary goal seems to be to prevent the sidewalk counselors from speaking with clinic clients. Clinic staff at times can be verbally abusive, physically violent, or file false charges. Thus sidewalk counselors, out of considerations of safety, are told to counsel in small groups.[25] One reason that sidewalk counselors generally prefer to counsel when there are no other protests is that there are generally fewer clinic escorts.

Sidewalk counselors are sustained in their efforts by a steady stream of women who respond positively to their offers

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[21] *Id.* at 5.

[22] *Id.* at 4.

[23] *Id.*

[24] *Id.*

[25] *Id.* at 3; Jeannie Hill, *Sidewalk Counseling Workbook* 5, 8 (1986) (printed by Sidewalk Counselors for Life, Inc., Denver, Colorado).

of assistance, care, and information. These women are often quite grateful to the sidewalk counselors for reaching them when they were on the verge of aborting. In addition, sidewalk counselors have the joy of seeing many babies born who otherwise would have been aborted. For example, sidewalk counselors in Birmingham, Alabama reported a "confirmed 93 babies saved" during 1993 in their January 1994 newsletter.[26]

III. This Court Has Recognized That Prolife Speech Addressed to Women Considering Abortion Can Further the Liberty and Health of Pregnant Women.

This Court recognized in *Planned Parenthood v. Casey* that a woman's liberty interest includes both the choice to abort, and the choice to carry a pregnancy to term. *See Casey*, 112 S. Ct. at 2811. This understanding of the woman's liberty interest led the Court to acknowledge that the "woman's right to make the ultimate decision" does *not* include "a right to be insulated from all others in doing so." *Id.* at 2821. Thus, the State was permitted to "express profound respect for the life of the unborn," *id.* at 2821, so long as the ultimate decision was left to the woman. The Court recognized that "most women considering an abortion would deem the impact on the fetus relevant, if not dispositive, to the decision," *id.* at 2823, and recognized the "risk that a woman may elect an abortion, only to discover later, with devastating psychological consequences, that her decision was not fully informed." *Id.* at 2823. Thus, informed consent statutes were viewed by this Court as potentially helpful to the "psychological well-being," and hence "health," *id.* at 2823, of women, as such statutes minimized the risk of severe psychological trauma and ensured a "more informed and deliberate," *id.* at 2825, decision.

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[26] The Birmingham Sidewalk Counselor, Vol. II, Issue 1, at 1 (January 1994).

IV. This Court Correctly Assumed That Abortion Counseling as Practiced in Abortion Clinics Typically Fails to Apprise Clients of Information Which Most Women Would Find Morally Relevant to the Abortion Decision.

This Court's acceptance of the positive benefits of informed consent statutes suggests a recognition that abortion counseling as practiced in abortion clinics typically does not apprise clients of either the facts of fetal development or of "the impact [of abortion] on the fetus." *Casey*, 112 S. Ct. at 2823. Members of this Court, well before *Casey*, had noted the generally inadequate nature of the counseling provided at abortion clinics. Justice O'Connor had noted that the physician-patient relationship "is nonexistent." *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 473 (1983) (O'Connor, J., dissenting). Justice Stewart had noted that abortion counseling "is typically limited to a description of abortion procedures, possible complications, and birth control techniques," and that the "physician had no prior contact" with the pregnant woman before the actual abortion procedure. *Planned Parenthood v. Danforth*, 428 U.S. 52, 91 n.2 (1976) (Stewart, J., concurring). Thus, the government speech permitted, but not required, in *Casey*, allowed the state to further the liberty and health of pregnant women, and to seek to protect the life of the unborn child, by informing the pregnant woman of relevant matters which most abortion providers avoid.

The failure of abortion counseling within clinics to address fetal development and other relevant facts is deliberate. Abortion counselors, for example, are trained to refer to the fetus as a "product of conception" or as "tissue." Carole Joffe, *The Regulation of Sexuality* 94 (1986). While this terminology may appear "neutral" to some, *see id.*, it can create the misleading impression that the fetus bears no physical or functional resemblance to a human infant. Abortion clinic personnel generally believe that abortion is a morally adequate response to an unwanted pregnancy, *id.* at 115, and apparently choose to avoid apprising their clients of facts which may lead some of their clients to a contrary conclusion. Thus,

abortion counseling within clinics generally seeks to assure the woman that the abortion procedure is not particularly painful. *See id.* at 94 (abortion counselors trained to uses words like "pinprick" and "discomfort" and to avoid using word "pain"). The question of abortion alternatives, if it is addressed at all, focuses narrowly on the question of whether a woman really wants to abort this pregnancy, while generally avoiding facts (such as fetal development) relevant to the fundamental question of whether aborting an unwanted pregnancy is moral. The latter question may, however, in the long-term weigh heavily upon women, as reflected, for example, in one survey which found that one-third of aborting women agreed with the statement that "abortion is murder." *See* Skelton, *Most Americans Think Abortion is Immoral*, L. A. Times, March 19, 1989, at 1. It cannot be easy, in the long-term, to believe that one has commissioned the murder of one's child.

The failure of abortion clinics to apprise their clients about the facts of fetal development, and of other issues related to the fetus, is not accidental, but rather is part of a broader attempt to shield women from the realities of abortion. For example, ultrasound is often used as a diagnostic technique in obstetrical practice, and thus abortion clinic personnel view the live fetus within the womb prior to the abortion. *See, e.g.*, Warren Hern, *Abortion Practice* 69-73 (1990 reprint). Abortion clinic personnel, however, hide the ultrasound screen from their clients. *See* Diane M. Gianelli, *Abortion Providers Share Inner Conflicts*, Am. Med. News, July 12, 1993, at 3, 37. Similarly, it seems to be a regularly practice to hide the dismembered fetal parts from the aborting woman, based on the rationale that "[s]he's probably not prepared for what she's going to see." *Id.* at 37. The medical literature further expresses a preference for abortion techniques that will permit the patient to "avoid[] the implications of the procedure" by avoiding contact with the fetus. *See, e.g.*, Nancy B. Kaltreider, et al., *The Impact of Midtrimester Abortion Techniques on Patients and Staff*, 135 Am. J. Obstet. Gynecol. 235, 236 (1979). This avoidance allows "the patient to continue her characteristic pattern of denial and have a smooth psycho-

logical course." *Id.* at 238. Thus, current abortion practice is specifically designed to separate the aborting woman from the act of abortion and ensure that someone other than the woman is the primary moral and physical actor in the task of killing and removing the fetus. *See generally* David M. Smolin, *Cultural and Technological Obstacles to the Mainstreaming of Abortion*, 13 St. Louis Public Law Rev. _____ (forthcoming March 1994).

V. The Amended Injunction is Based on a View of the Health and Liberty of Women that Was Rejected by This Court in *Planned Parenthood v. Casey*.

The trial judge justified the amended injunction in terms reminiscent of *Thornburgh v. ACOG*'s rejection of informed consent statutes. Thus, the amended injunction was based in part on the abortionist's testimony that abortion protests caused patients "a higher level of anxiety," 626 So.2d at 678 (finding I), while *Thornburgh*'s rejection of informed consent statutes was based in part on the Court's view that information about the fetus would "heighten [the woman's] anxiety." 476 U.S. at 762. The amended injunction relies on the abortionist's view that prolife speech is bad for the "health" of women considering abortion, while *Thornburgh* allowed abortionists as a class to determine the amount and kind of knowledge about abortion that women would receive.

Abortion clinic practice is predicated on the belief that avoidance of the reality of abortion, in terms of fetal development and the impact on the fetus, best facilitates the health and liberty of women. *See* section IV, *supra*. Abortionists as a class generally share this view, and thus will generally be available to testify that prolife speech negatively affected the liberty and health of women. Abortion practice, abortionists, *Thornburgh*, and the amended injunction share this basic premise that prolife speech which forces women to face the facts of fetal development, and the reality of abortion, significantly interferes with the health and liberty of women.

This Court in *Planned Parenthood v. Casey* overruled *Thornburgh* on these relevant premises about the liberty and health

of women. *Casey* properly takes a more long-term view of women's health. Censoring prolife speech may make it easier for the woman to abort, and may thereby protect women from a certain measure of pre-abortion anxiety and stress. This reduction in anxiety and stress must be measured against the "devastating psychological consequences," *Casey*, 112 S. Ct. at 2823, of discovering the facts of fetal development, and of what abortion does to the fetus, *after* the abortion. *Casey* further rejects *Thornburgh*'s premise that protecting women from accurate information about fetal development and alternatives to abortion furthers the woman's liberty. *Casey* instead holds that a woman who is well-informed is better able to exercise her liberty interest in deciding whether *or not* to abort. *See Casey*, 112 S. Ct. at 2822-26.

VI. The Amended Injunction Improperly Extends the Flawed Reasoning of *Thornburgh* to Private, Rather than Governmental, Expression.

Even if *Thornburgh*'s flawed analysis of the health and liberty of women were accepted, it would not justify the broad amended injunction. First, the activities of nongovernmental actors, even if they go far beyond the bounds of expression protected by the first amendment, cannot violate the abortion liberty, because the due process clause applies only to *state* deprivations of liberty. *See Bray v. Alexandria Women's Health Clinic*, 113 S. Ct. 753, 764 (1993). Second, the nonviolent expression of private individuals and associations is protected by the free speech clause even if it is offensive or controversial. *See Claiborne Hardware*, 458 U.S. at 911.

The governmental speech permitted by *Casey* was characterized by the Court as "truthful, nonmisleading information." 112 S.Ct. at 2823. *Amici* believe that much prolife speech by private individuals and associations, including particularly speech by sidewalk counselors, meets the *Casey* standards for *governmental* speech. It is highly ironic that the amended injunction forbids *private* parties located on a public forum outside of an abortion clinic from engaging in a kind of speech that this Court permits even to the *government*

within the abortion clinic. Surely private individuals in a public forum have greater free speech rights than does the government acting within a private facility. However, private parties should not be subject to the limitations of governmental speech as articulated in *Casey*, as such a result would create special disabilities for prolife speakers in violation of the free speech clause. The free speech clause permits both prolife and abortion rights speakers a degree of freedom in content and form of expression which is unavailable to the government.

CONCLUSION

These amici urge the Court to protect the free speech and associational rights of prolife individuals and associations, and particularly of sidewalk counselors, and to protect the corollary rights of women considering abortion to receive offers of assistance, care, and information that will assist some in choosing childbirth. The amended injunction should be held unconstitutional as a content and viewpoint based restriction on free speech, as an unconstitutional prior restraint on free speech, and as a violation of the First Amendment's protections of free speech and association. The trial court's punishment of all prolife individuals and associations, for the alleged wrongdoing of a few, should be rebuffed.

The decision of the Florida Supreme Court upholding the amended injunction should be reversed.

Respectfully submitted,

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No. 93-880

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

JUDY MADSEN, ED MARTIN and SHIRLEY HOBBS,
Petitioners,
v.
WOMEN'S HEALTH CENTER, INC., AWARE WOMEN CENTER FOR CHOICE, INC., EPOC CLINIC, INC. and CENTRAL FLORIDA WOMEN'S HEALTH ORGANIZATION, INC.,
Respondents.

CORRECTED COPY

On Writ of Certiorari to the Supreme Court of Florida

MOTION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE AND BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE IN SUPPORT OF NEITHER PARTY

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Respondents.

On Writ of Certiorari to the Supreme Court of Florida

MOTION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE

The American Federation of Labor Congress of Industrial Organizations ("AFL-CIO") moves for leave to file the attached brief *amicus curiae* in support of neither party. Although the parties in this case have filed with the Court a general consent to all briefs *amicus curiae* in support of *either* party, counsel for respondent has informed the AFL-CIO that respondent does not construe that general consent as applying to a brief supporting *neither* party, and that, accordingly, respondent will not consent to the AFL-CIO brief. In support of this motion the AFL-CIO states as follows:

1. The AFL-CIO is a federation of 86 national and international unions with a total membership of approximately 14,000,000 working men and women.

2. Historically, the AFL-CIO and its member unions, have had a vital interest in the First Amendment rights of citizens to disseminate their views among the public by picketing, handbilling and other peaceful means. Indeed, many of the leading cases that this Court has decided in the First Amendment area have involved the efforts of union members to engage in peaceful handbilling and other expressive activities. *See, e.g., Hague v. CIO*, 307 U.S. 496 (1939); *Schneider v. State*, 308 U.S. 147, 155 (1939); *Thornhill v. Alabama*, 310 U.S. 80 (1940); *Thomas v. Collins*, 323 U.S. 516 (1945); *NLRB v. Fruit Packers*, 377 U.S. 58 (1964); *DeBartolo v. Florida Gulf Coast Trades Council*, 485 U.S. 568 (1988). Because of the AFL-CIO's vital interest in this area, the Federation has filed briefs as an *amicus curiae* in a substantial number of this Court's recent cases involving the exercise of First Amendment rights in public streets. *See, e.g., International Society for Krishna Consciousness v. Lee*, —— U.S. ——, 112 S. Ct. 2709 (1992); *United States v. Kokinda*, —— U.S. ——, 110 S. Ct. 3115 (1990); *Frisby v. Schultz*, 487 U.S. 474 (1988); *Board of Airport Commissioners v. Jews for Jesus, Inc.*, 482 U.S. 569 (1987); *Heffron v. International Society for Krishna Consciousness*, 452 U.S. 640 (1981).

3. The AFL-CIO and its member unions have also, over the years, had a vital interest in the scope of the power of courts to enjoin expressive activities in the context of public protests. One of the major studies of the injunctive powers of courts was prompted by the danger that such powers could be used overbroadly, or otherwise abused, in the context of labor disputes, to the effect that the legitimate expressive rights of unions and workers might be unnecessarily sacrificed. *See* Frankfurter & Greene, *The Labor Injunction* (1930). Indeed, recognition that particular danger may be posed by abuses of injunctive powers in the context of labor disputes led Congress to pass the Norris-LaGuardia Act, 29 U.S.C. § 101, *et seq.*, which protects against such abuses in federal court proceedings.

4. This case involves a proceeding in a state court in which a judge, in response to objectionable conduct committed by those involved in public protest demonstrations, broadly enjoined a variety of peaceful expressive activities at the site of the protests as well as enjoining any continued commission of objectionable conduct. The attached brief *amicus curiae* examines the circumstances under which such a broad judicial response to the objectionable conduct of protesters is valid, under the First Amendment, and when such a broad response is invalid.

CONCLUSION

For the above-stated reasons, this motion for leave to file a brief *amicus curiae* should be granted.

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BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE IN SUPPORT OF NEITHER PARTY

INTRODUCTION AND SUMMARY OF ARGUMENT

This case arose out of a series of demonstrations by anti-abortion activists outside of a family planning clinic. Because the demonstrators were obstructing and otherwise impeding entry into the clinic and its parking lot, principally by standing in driveways and roadways, the clinic (along with other clinics) brought suit against several organizations and individuals, seeking injunctive relief. A precisely focused permanent injunction resulted, directed at the following enumerated activities:

> 1. trespassing on, sitting on, blocking, impeding or obstructing ingress into or egress from any facility at which abortions are performed . . .
>
> 2. physically abusing persons entering, leaving, working or using any services of any facility at which abortions are performed . . .
>
> 3. attempting or directing others to take any of the actions described. [Petition for Writ of Certiorari ('Pet.") 4-5.]

The present petitioners, three individuals who were defendants in the underlying lawsuit and who were enjoined by name from engaging in these prohibited activities, do not now contest the issuance of this original injunction or its application to them.[1]

---

[1] All of the petitioners were named defendants in this action from the outset. The Petition for Writ of Certiorari notes several times that, according to a stipulation entered before the issuance of the original injunction, the three individuals who are the present petitioners had "not actually physically blocked access to abortion clinics located in Brevard or Seminole County." Pet. at 19, 21-22. The present appeal, however, concerns only the propriety of the parts of the *amended* permanent injunction that was issued later—and restricts communicative activity—not the substantial evidence question whether petitioners should have been found liable for committing unlawful acts and subject to any injunction at all

Several months after the issuance of this injunction, the plaintiff moved the trial court to modify the injunction, on the ground that demonstrators continued to engage in the activity enjoined and were also engaging in other activities, at the clinic and elsewhere, alleged to be harassing and/or intimidating to the clinic's clients and staff. After a three-day evidentiary hearing, the trial court issued a broad amended permanent injunction, prohibiting a wide range of nonspeech activity, but also limiting speech activity by the demonstrators within designated areas.[2]

In this brief we address the standards that govern in determining the validity of such "buffer zone" restrictions on speech. The generic issue here involves the nature and extent of the injunctive power to respond to disruptive actions by banning what would otherwise be First Amendment-protected communicative activities on public streets.[3]

This generic issue, and its importance, long antedates the abortion controversy. The labor movement, the civil rights movement, the student and antiwar movements, and a wide variety of other public protest movements have all, despite differences in goals and in tactics, generated questions concerning the appropriate role of injunctions in controlling street demonstrations of various kinds, in view of the need to frame such injunctions in a manner consistent with the First Amendment. *See, e.g., Milk Wagon Drivers Union v. Meadowmoor Dairies*, 312 U.S. 287 (1941); *Carroll v. President & Commissioners of Princess Anne*, 393 U.S. 175 (1968); *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971); *NAACP*

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on the basis of the original evidence before the trial court. *See* Initial Brief of Appellants in the District Court of Appeal of Florida, Fifth District, 5 DCA Case No. 93-00969, at 5; Pet. at i, Questions Presented.

[2] The relevant portions of the injunction are discussed in detail at pp. 24-29, *infra*.

[3] Public streets and sidewalks are, of course, areas in which the government's ability to restrict expressive activity is very limited. *See* pp. 14-15 *infra*.

v. Claiborne Hardware, 458 U.S. 886 (1982); *cf. Cox v. Louisiana*, 379 U.S. 536 (1965).[4] And, in all probability, in the future still other individuals and groups will press their strongly-held viewpoints through public protests in which fully-protected speech activity combines with street actions by some that obstruct, illegally intrude on, or even physically endanger others.

1. At the outset, we clarify why the questions raised in the Petition concerning the validity of the "buffer zone" provisions of the amended injunction are the *only* issues properly before the Court. *See* pp. 5-11, *infra*.

First, we show that the record does not support petitioners' contention that the extension of the amended injunction to all those "in concert" with the named defendants indicates that the injunction as a whole is viewpoint discriminatory. To the contrary, the record indicates that the "in concert" language—which is commonly used in the wording of injunctive relief—would *not* reach anti-abortion demonstrators whose actions are taken independently of the named defendants. *See* pp. 5-8, *infra*.

Second, aside from its argued evidentiary import regarding the nature of the injunction as a whole, the "in concert" provision is not properly before this Court. The present petitioners are all named defendants, covered by the injunction directly. Accordingly, no individual before the Court is directly affected by the "in concert" language, and the Court should not, in the abstract, determine the reach of that language, nor consider constitutional challenges to its inclusion. *See* pp. 8-10, *infra*.

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[4] *See*, for discussions of the problematic use of broad injunctions in the historical context of various protest movements, Frankfurter & Greene, *The Labor Injunction* (1930); Rosenthal, *Injunctive Relief Against Campus Disorders*, 118 U. Pa. L. Rev. 746 (1970); Note, *Equity on the Campus: The Limits of Injunctive Regulation of University Protest*, 80 Yale L. J. 897 (1971); Shatz, *Picketing Injunctions in California, A Study of the Role of the Courts in Farm Labor Disputes*, 28 Hastings L. Rev. 801 (1977); Ledewitz, *Civil Disobedience, Injunctions and the First Amendment*, 19 Hofstra L. Rev. 67 (1990).

Third, petitioners' contention that they themselves are not properly covered by the amended injunction is also not properly before the Court. *See* pp. 10-11, *infra*.

2. The three "buffer zone" provisions in the amended injunction all seriously restrict expression on public streets and sidewalks; those locations are traditional public forums, in which the government's ability to regulate expressive conduct is very limited. Because injunctions raise special First Amendment concerns, the standards governing the validity of generally applicable time, place and manner restrictions in public forums are not sufficient to determine the validity of injunctions that restrict speech. *See* pp. 12-19, *infra*. On the other hand, this Court has made clear that in very narrow circumstances—namely, when "the essential needs of the public order" are at stake and the order is "couched in the narrowest terms that will accomplish the pin-pointed objective" (*Carroll v. President and Commissioners of Princess Anne*, 393 U.S. 175 (1968))—courts may enjoin peaceful expressive activity as a remedial measure in a case involving widespread, unlawful, nonspeech conduct. *See* pp. 19-22, *infra*.

As we show, this narrow judicial power may, consistent with the First Amendment, ordinarily be exercised only where: (a) a defendant has violated a preexisting, generally applicable legal norm; (b) a prior injunction applying only to illegal, nonspeech conduct, has failed to contain the unlawful activity; (c) the unlawful activity is continuous, pervasive, and severely threatening to the safety of others; (d) each aspect of the order that affects speech does so in measured increments and to the least degree necessary to eliminate the unlawful conduct underlying the injunction; (e) the order is tailored to allow some retention of speech rights in each area except where there has been pervasive violence; and (f) the order is further tailored so that each aspect of the speech-related restriction is directly related to the curbing of unlawful conduct. *See* pp. 23-24, *infra*.

3. Tested against these standards, the Florida Supreme Court's rationale for upholding the three buffer zone pro-

visions is inadequate for its task. Given that the decision below was rendered in the absence of a complete record, it may well be proper for this Court, after clarifying the proper standards, to remand the case for the Florida courts to determine, on a proper record, whether those provisions can pass muster under the exacting standards that the First Amendment compels. *See* pp. 24-29, *infra*.

ARGUMENT

A. *Delineating the issues properly before this Court.* Although two of the three Questions Presented in the Petition for Writ of Certiorari in this case concern the propriety of the various geographical "buffer zones" created by the amended permanent injunction, the body of the Petition itself focused largely on a distinctly different issue—the identity of the individuals who may be reached by an injunction of this kind. Consequently, before addressing the central questions we understand to be before the Court—those concerning the validity of direct restrictions on speech activity within certain areas—we explain why we believe these "buffer zone" questions are the *only* questions even arguably before this Court.[5]

1. The amended injunction applies to named organizations, named individual defendants (of whom the present petitioners are three) and "all persons acting in concert or participation with them, or on their behalf, with notice in any manner or by means of this order." Pet. App. B-6. The Petition raises as a Question Presented "Whether a state court injunction prohibiting named demonstrators

[5] The following aspects of the injunction are *not* challenged, and would remain in effect whatever the disposition of this case in this Court: prohibitions upon (1) "entering the premises and property" of the respondent clinic; (2) "blocking, impeding, inhibiting, or in any other manner obstructing or interfering with access to, ingress into and egress from any building or parking lot of the Clinic;" (3) "harassing, intimidating or physically abusing, assaulting or threatening" staff members of the clinic; or (4) "physically abusing, grabbing, intimidating, harassing, touching, pushing, shoving, crowding or assaulting persons entering or leaving, working at, or using services" of the clinic or leaving or entering "homes of owners, staff or patients" of the clinic. Pet. App. B-7 to B-9.

and those acting 'in concert' from expressing peaceful speech within several designated buffer zones violates the First Amendment's protection of freedom of speech and association." Pet. at i. The Petition is largely devoted to this Question, and maintains, as had the Eleventh Circuit in reviewing this same injunction in *Cheffer v. McGregor*, 6 F.3d 705 (11th Cir. 1993), that the "in concert" provision rendered the injunction as a whole viewpoint-specific and therefore invalid.

2. There is no merit to the substantive contention that the "in concert" aspect of the injunction renders the injunction as a whole viewpoint discriminatory.

The Eleventh Circuit's conclusion in *Cheffer v. McGregor*, pressed by petitioners upon this Court, was that:

> When reduced to its essentials, Judge McGregor's Amended Permanent Injunction, by operating on persons not before the court, serves as a statute of local effect regulating picketing by anti-abortion speakers. . . . That the speech restrictions at issue here are viewpoint-based cannot seriously be doubted. . . . The practical effect of this section of the injunction was to assure that while "pro-life" speakers would be arrested, "pro-choice" demonstrators would not. [6 F.3d at 710-11.]

As evidence that the injunction indeed had this effect, the Eleventh Circuit relied on a statement by the trial judge at a preliminary hearing for several individuals arrested for violating the amended injunction:

> Judge McGregor . . . explained (to the arrestees): [T]he injunction did not pertain to those on the other side of the issue, because the word in concert with means in concert with those who had taken a certain position in respect to the clinic, adverse to the clinic. If you are saying that is selective basis that the pro-choice were not arrested when pro-life was arrested, that's the basis of that selection. [6 F.3d at 711 n.11.]

The "in concert" provision of the injunction, however, far from being an unusual characteristic of the injunction, as the Eleventh Circuit supposed, is so standard

that it is expressly sanctioned by the Federal Rules of Civil Procedure. *See* Fed. R. Civ. P. 65(d) (injunctions may be made "binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.").

Moreover, contrary to the Eleventh Circuit's conclusion and petitioners' contention, the trial judge here did *not* state that he meant by this provision to allow conviction for contempt of the injunction on the basis of actions by *any* non-party professing antiabortion views within the proscribed areas. Rather, the trial judge made it clear that antiabortion protestors could *not* be convicted simply on the basis of the views they were promoting and their location in violation of the injunction. The question whether or not individuals meeting that criteria also met the additional criteria of being "in concert or participation" with the original defendants *would* be litigable at trial on the contempt proceedings.[6] While the trial judge did recognize that pro-choice protestors were unlikely to

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[6] *See* Hearing of April 13, 1993 at 40 (answering an individual cited for contempt who said "But I was in concert with nobody" with "that would be a matter of defense that you would present at the time of trial"); *id.* at 43 (essentially the same colloquy repeated); *id.* at 93 (answering another individual cited for contempt who protested that "I'm not working in conjunction with anybody" with "again, those may be defensive matters . . . at the time of trial"); *id.* at 115 (answering another arrested individual inquiring whether the "ideology of . . . people . . . [had] anything to do . . . in the arrest", by stating "I don't know. All I know is the officer used his perceptions, his eyes, his ears, took note of the activities that were going on, and . . . he believed that you were in concert with those that had been enjoined."); *id.* (answering "no" to the inquiry whether "one of the reasons that I was arrested was because I opposed abortion in the clinic"); *id.* at 119-120 (in response to inquiry "where on my arrest report does it allege that I was in concert with anyone", answering that "it is embodied in the phrase violation of the Injunctive Court Order . . . this is an arrest report. It is not a formal charge. Presumably within the formal charge there will be that reference . . . and it is a matter that should be brought to the trial of the matter.").

be arrested under the injunction, that was because it is, as a matter of common experience, exceedingly unlikely that individuals who are promoting *pro-choice* positions are working in concert with, or participating in a single demonstration plan with, those *antiabortion* protestors who were parties in the initial action.[7]

Thus, the contention that the "in concert" provision, on its face or as applied, renders the injunction as a whole a viewpoint-based restriction on speech simply does not comport with the language of the injunction or its interpretation by the relevant enforcement authorities.[8]

3. We hasten to emphasize that, as actually applied to specific individuals engaged in associational and expressive activities, difficult questions with serious due process and First Amendment implications may arise,

[7] *See* Hearing of April 13, 1993, at 40 ("The Injunction is directed only against certain named Defendants, certain named organizations and those acting in concert with them. Presumably, as you say, the other side would not have been acting in concert with the named Defendants."); *id.* at 105 ("the Injunction did not pertain to those on the other side of the issue, because the word in concert with means in concert with those who had taken a certain position in respect to the clinic, adverse to the clinic.").

Moreover, the City of Melbourne maintained that it was *not* distinguishing in making arrests within the designated buffer zones between pro- and anti-abortion protestors, but was interpreting the "in concert" phrase "by taking into custody and bringing before the Court those persons who, after specific notice of the Injunction's terms, refused to comply and continued to congregate in, picket, patrol, demonstrate in, or enter the 'buffer zone.'" *Motion to Intervene and to Clarify Amended Injunction* at 4 (May 18, 1993).

[8] We note that if indeed the injunction did provide—whether in terms or as interpreted by the courts upon enforcement—that the "in concert" element of the order could be satisfied simply by showing that the individual in question was communicating an antiabortion message within one of the "buffer zones", then we would agree that the injunction in question is viewpoint-discriminatory and invalid. Where individuals are merely expressing the same views as the original defendants but are not doing so as part of a single integrated effort to perpetrate illegal activities, there is no basis for abridging *ab initio* those independent individuals' right to engage in expressive activities peacefully and without obstructing others.

depending upon the precise interpretation given to the "in concert" phrase.[9] In this case, however, there is no one before the Court who is subject to the "in concert" aspect of the injunction. The three individual petitioners all have been named defendants from the outset of this litigation, and have no direct interest in the application of the "in concert" provision, other than the evidentiary interest discussed above.

Under very similar circumstances, this Court has declined to adjudicate the question of the precise reach of an injunctive order reaching nonparties to the underlying litigation:

[9] Such serious questions would arise unless "in concert" were construed so as to preclude an individual from being liable for acting "in concert" with named defendants simply because the individual engaged in activities that would otherwise be protected speech and associational activities. For example, such questions would arise if an individual's speech activities were held to violate an injunction simply because (a) the individual is a member of an organization that is a named defendant; (b) the individual engages in speech activity in a public demonstration called by a named defendant; or (c) the individual shares common ideological goals with the named defendant. Rather, to avoid serious first amendment questions, the term "in concert" should be construed to bring under an injunction only those who associate with a defendant in order to accomplish the defendant's *unlawful* goals. *Cf. United States v. Robel*, 389 U.S. 258 (1967); *Scales v. United States*, 367 U.S. 203 (1961).

This Court has indicated that, aside from First Amendment considerations, due process considerations alone preclude application of an injunction to an independent non-party:

> [C]ourts may not grant an enforcement order or injunction so broad as to make punishable the conduct of persons who act independently and whose rights have not been adjudged according to law. [citations omitted]. [Federal Rule of Civil Procedure 65(d)] . . . is derived from the common-law doctrine that a decree of injunction not only binds the parties defendant but also those identified with them in interest, in "privity" with them, represented by them or subject to their control. In essence it is that defendants may not nullify a decree by carrying out prohibited acts through aiders and abettors, although they were not parties to the original proceeding. [*Regal Knitwear Co. v. NLRB*, 324 U.S. 9, 13-14 (1945).]

> No concrete case is before us. We have here an abstract controversy over the use of these words, and it is as sterile as abstract controversies usually are. The employer objects to the words of the order merely as words. They do not enlarge its own obligation. . . . The Board is not here attempting to reach or to hold anyone in contempt by virtue of such orders. No [non-party] appears before us complaining that these words put him in jeopardy. No one can be punished for contempt because of these words until after a judicial hearing, in which their operation could be determined on a concrete set of facts. All that is before us is the question whether we will hold abstractly that this provision is an illegal one to include in . . . an enforcement order of the Court. [*Regal Knitwear v. NLRB*, 324 U.S. at 15-16.]

Since, as in *Regal Knitwear*, any nonparty potentially affected by the injunction will have the opportunity to contest its reach (as Ms. Cheffer did in *Cheffer v. McGregor*), this Court should not adjudicate the question in the abstract without a record concerning the actual connection between a particular individual and the defendants.

4. Petitioners also appear at points to be contending that, aside from the "in concert" provision, there is a defect in the amended permanent injunction of constitutional dimensions because the three individual defendants either were not found or could not properly have been found, on the actual record, to have violated the original permanent injunction. The Joint Appendix in this Court suggests that with respect to at least one, and perhaps two, of the three present petitioners, there is not substantial evidence to support a finding that the individual in question violated the original injunction. As we gather it, the petitioners' argument—with which we agree—is as follows: while there may be a predicate for enjoining individuals from engaging in certain communicative activity in certain places—if those individuals have committed, in violation of an earlier injunction not reaching speech-related activity, wrongful disruptive acts—there is no

predicate for thus enjoining an individual who has not violated such an earlier injunction.

Like the claim that the individual petitioners should not have been found liable in the first place on the basis of the record (*see* n.1, *supra*), this contention is not properly before this Court. Petitioners, to be sure, contend that the Florida Supreme Court should have "examine[d] the lower Florida court's record and separate[d] those known to have acted unlawfully from the Petitioners and their peaceful speech". Pet. 12. But such examination would have been an impossibility since petitioners, as appellants in the Florida courts, *did not designate transcripts of the relevant hearings* as part of the record but, instead, attacked the amended injunction on its face. *See* Joint Appendix, Index, at iii (including testimony at hearing that was "transcribed after the Petition for Writ of Certiorari and was not before the Supreme Court of Florida"); *id.* (objection of petitioners to inclusion of that testimony); Joint Appendix at ii (inclusion of testimony from the hearing that was before the Florida Supreme Court only because it was attached to the Appendix of respondents in that court); Appellees' Brief in the District Court of Appeal of Florida, Fifth District, Case No. 93-969 at 3-5. Since the question of petitioners' individual responsibility for violation of the original, limited injunction was not properly presented to the Florida Supreme Court (and was not in fact decided by that Court), that question is not properly presented to this Court on certiorari. *See Illinois v. Gates*, 462 U.S. 213, 218-20 (1983).[10]

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[10] This failure to certify to the Florida Supreme Court the full record of the hearing upon which the speech-restricting aspects of the injunction were based infects even those issues that are otherwise properly before this Court, and suggests that certiorari was improvidently granted. *Milk Wagon Drivers Union v. Meadowmoor Dairies*, 312 U.S. at 293, held that in determining whether an injunction reaching peaceful picketing is valid because the picketing had taken place in an atmosphere of pervasive violence, it is critical that the appellate courts not allow "constitutional freedom [to be] . . . defeated by insubstantial findings of fact

B. *Devising standards for injunctions impeding expressive activity.* The other three aspects of the injunction properly challenged in the Petition all involve "buffer zones" imposed by the injunction within which expressive activity is either forbidden or severely limited.[11] Two of the restrictions—those applying to the thirty-six foot "zone" around the clinic's property line[12] and the three-

screening reality." At the same time, the basic responsibility for this constitutionally necessary review "to resolve conflicts in the testimony and its interpretation was in the [state] courts and not here." *Id. See also NAACP v. Claiborne Hardware*, 458 U.S. at 923-24.

Federal questions are reviewable in this Court on certiorari, of course, only if properly presented first to the highest court of the state in which review is available. *See, e.g., Illinois v. Gates*, 462 U.S. at 218-22 (1983). This requirement respects the need for comity, the competence of state courts to adjudicate federal constitutional claims, and the importance of providing state courts with the opportunity to construe the challenged provisions after evaluating the strength of the constitutional arguments. *Id.*; *Cardinale v. Louisiana*, 394 U.S. 437, 439 (1969). Here, the state court was disabled, because of the way the present petitioners chose to frame their appeal, either from conducting meaningful constitutional review on the complete pertinent record or from considering, in light of that review, the need to limit the injunction by construction or modification.

[11] The Petition, in its body, also attacks as violative of the First Amendment paragraph (4) of the injunction, forbidding at certain times "singing, chanting, whistling, shouting, yelling, use of bullhorns, auto horns, sound amplification equipment or other sounds or images observable to or within earshot of the patients inside the Clinic." Petition for Writ of Certiorari at 16, 18. None of the three Questions Presented however, fairly read, encompass that attack. All three explicitly refer to the "buffer zone" provisions of the Petition, while paragraph (4) designates no geographical limitation within which a certain kind of expression is forbidden but, instead, applies to sounds and images, wherever generated, which can be heard or seen inside the Clinic. This Court has emphasized that only issues fairly included in the Questions Presented in the Petition will be considered. *Yee v. City of Escondido*, —— U.S. ——, 112 S. Ct. 1522, 1532-34 (1992).

[12] This zone has several exceptions, including a smaller, five foot "buffer zone" at the back of the clinic property, abutting a public highway. Pet. App. B-7.

hundred foot area around the residences of the Clinic's employees, staff, owners, or agents—effectively ban communication by the petitioners within the designated areas.[13] The third—the restriction applicable to the three-hundred foot area around the Clinic—forbids "physically approaching any person seeking services of the Clinic unless such person indicates a desire to communicate." It thereby bans, within that area, both traditional modes of handbilling and literature distribution, and any initiation of face-to-face oral communication.

The three different "buffer zone" provisions at issue in this case all seriously restrict expression on public streets and sidewalks. Indeed, the injunction issued in this case is more sweeping with regard to restricting expressive activity than almost any of the injunctions approved by other courts in the abortion protest cases.[14]

[13] Paragraph (3) forbids "congregating, picketing, patrolling, demonstrating, or entering" the designated area around the Clinic. Pet. App. B-7 to B-8. Paragraph (6) forbids, *inter alia*, "approaching, congregating, picketing, patrolling, demonstrating, or using bullhorns." It is not clear whether the prohibition on "approaching" in paragraph (6), like the ban on "entering" in paragraph (4), forbids petitioners from coming within the "buffer zone" area at all, or has some more limited meaning.

[14] The instant injunction is substantially more restrictive of speech than those approved in the following cases: *Planned Parenthood v. Holy Angels Catholic Church*, 775 F. Supp. 617, 625 (N.D. Cal. 1991) (creating a "buffer zone" of twenty five feet from any *entrance* to the Clinic, within which "[d]emonstrating, picketing, distributing literature, or counseling" is forbidden, and banning "[a]pproaching any person *once such a person has stated that he or she does not wish to be approached*" (emphasis supplied)); *Planned Parenthood v. Operation Rescue*, 550 N.E. 2d 1361 (Mass. Sup. J. Ct. 1990) (where protestors blocked entrance ways and lobbies of clinics by lying on the ground and some protestors chained themselves to doors and toilets inside the clinic, the injunction only "enjoin[ed] the defendants from engaging in illegal activity, such as trespass or obstruction of clinic entranceways"); *Chico Feminist Women's Health Center v. Scully*, 208 Cal. App. 3d 230, 237 (1989) (prohibiting "being within 15 feet of clients in their cars without having been invited"; creating a "buffer zone" ten feet wide from the doorway of the clinic to the

1. This Court has continually reaffirmed that whatever may be the case in other areas owned or controlled by the government, public streets and sidewalks

> are considered, without more, to be 'public forums'. . . . In such places, the government's ability to permissibly restrict expressive conduct is very limited: the government may enforce reasonable time, place and manner regulations as long as the restrictions 'are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.' [citation omitted] . . . Additional restrictions such as an absolute prohibition on a particular type of expression

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nearest street, while allowing two picketers within the zone; creating a second buffer zone twenty-five feet from the building, within which picketers must remain at least ten feet apart; and addressing or offering literature "to any employee, agent, client, visitor, [or] business invitee of plaintiff *who has already refused such offer*" (emphasis supplied)); *National Organization for Women v. Operation Rescue*, 914 F.2d 582, 584 (1990) (injunction forbids only trespassing, blockading, impeding, or obstructing access, and district court refusing on First Amendment grounds with Fourth Circuit approval, any broader injunction); *Portland Feminist Women's Health Center v. Advocates for Life, supra*, 859 F.2d 681, 684 (9th Cir. 1988) (prohibiting "demonstrating or distributing literature" in a rectangular buffer extending to the street and reaching twelve and a half feet on either side of the Center's door); *Roe v. Operation Rescue*, 710 F.Supp. 577, 589-90 (E.D. Pa. 1989) (injunction prohibits "trespassing on, blocking, or obstructing ingress or egress from any facility at which abortions are performed" in Philadelphia and "physically abusing or tortiously harassing persons entering, leaving, working at or using any services" at any such facility), *aff'd as to injunction*, 919 F.2d 857 (3d Cir. 1990); *New York NOW v. Terry*, 886 F.2d 1339, 1345 n. 1, 1362-64 (2d Cir. 1989) (injunction virtually identical in scope to injunction in *Roe v. Operation Rescue, supra*). In many of these cases the injunctions specifically stated that they should not be construed to restrict legitimate free speech activities.

The only injunction approved by a court in the abortion protest context that might arguably be more restrictive of speech than the instant injunction is that in *Northeast Women's Center, Inc. v. McMonagle*, 939 F.2d 57, 59, 72-73 (1991), a case in which protesters repeatedly entered into the clinic building and physically attacked patients and employees.

> will be upheld only if narrowly drawn to accomplish a compelling governmental interest. [*United States v. Grace*, 461 U.S. 171, 177 (1983).]

See also Frisby v. Shultz, 487 U.S. 474, 479 (1988); *Boos v. Barry*, 485 U.S. at 318 (1988). An otherwise valid "time, place and manner" restriction

> must be narrowly tailored to serve the government's legitimate content-neutral interests but . . . need not be the least restrictive or least intrusive means of doing so. . . . To be sure, this standard does not mean that a time, place, or manner regulation may burden substantially more speech than is necessary to further the government's legitimate interests. Government may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals. [*Ward v. Rock Against Racism*, 491 U.S. 781, 798-99 (1989).]

The Florida Supreme Court in this case, and most of the other courts that have in recent years reviewed abortion protest injunctions that directly restrict expressive activity, have viewed the issue before them as whether or not the injunction can meet the standards that govern the validity of time, place and manner restrictions in public forums.[15] As far as we are aware, however, *none* of the cases in which this Court has applied the "time, place and manner" standard has involved a judicially-devised injunction limiting the speech activity of specific groups and individuals *based upon particular illegal conduct by those groups and individuals*, as opposed to an across-the-board, generally applicable statute or administrative practice. The evident distinctions between generally applicable norms regarding expressive activity on particular public streets, sidewalks, and other public forums and judicially-devised injunctions such as the one in this case

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[15] *See, e.g., Planned Parenthood v. Holy Angels Catholic Church*, 675 F. Supp. at 625; *Portland Feminist Women's Health Center v. Advocates for Life*, 859 F.2d at 686; *Chico Feminist Women's Health Center v. Scully*, 208 Cal. App. 3d at 244.

counsel for somewhat different, and more particularized, standards for judging the validity of the latter.

a. Generally applicable statutes that are not content-based and that do meet the other time, place and manner standards ordinarily create relatively little danger of censoring one set of ideas or speakers but not others. Where the community as a whole has to live with a particular restriction, the possible effect upon diverse groups and the diffusion of their diverse ideas is likely to curb any censorial motive, to act as an inherent check on over-broad regulation, and thereby to lessen the need for close judicial oversight. *Cf. Railway Express v. New York*, 336 U.S. 106, 112-113 (1949) (Jackson, J., concurring) ("[T]here is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply [such burdens] and thus to escape the political retribution that might be visited upon them if larger numbers were affected.").

In contrast to general legislation, injunctions, by their nature, reflect highly discretionary judgments that are tailored to particular speakers and situations, and that are directed only at those individuals before the court. The burdens imposed by an injunction often reflect judge-created norms rather than legislatively established rules.[16] And the individuals before the court are there because they have been brought before the court by other private individuals, not by public officials.[17]

[16] In this case, for example, the injunction severely restricts picketing and other demonstrations in residential areas, even though it does not appear that there is any statute in the relevant jurisdictions specially regulating residential picketing or other communicative activity. The result is an entirely judge-created norm, not filtered through or tempered by any legislative or other democratic process, and applicable only to the present defendants.

[17] In this instance, for example, the plaintiff clinic and the defendants obviously have entirely different views concerning the propriety of abortions. The clinic, as the instigator of this action, would have every incentive to attempt to curb not only the defendants tortious and illegal actions affecting the clinic's operation but also the communication of its message to the intended audience.

Moreover, it is plain that both the trial court and the Florida Supreme Court were concerned in large part with the likely emotional impact of petitioners' particular message about the moral propriety of abortion upon the clients and staff of the clinic, and not only with the physical impact of petitioners' obstructive and intrusive activities. *See, e.g.*, Pet. App. A-16, A-18, B-3, B-4 (disapprovals of anti-abortion protestors' use of such inflammatory rhetoric as "child murderer" and "baby killer" in describing physicians and other clinic personnel, and assertions that the state has legitimate need to protect such personnel from such inflammatory rhetoric).

Petitioners' message, and the particular words and images they used to express it, undoubtedly caused great anguish to those at whom the message was targeted. But censoring communication because of the impact of the message on listeners is, of course, entirely impermissible under the First Amendment. "[A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger." *Terminiello v. City of Chicago*, 337 U.S. 1, 4 (1949). *See also Organization for a Better Austin v. Keefe*, *supra*, 402 U.S. at 419 ("[p]etitioners plainly intended to influence respondent's conduct by their activities . . . and were engaged openly and vigorously in making the public aware of respondent's real estate practices. Those practices were offensive to them, as the views and practices of petitioners are no doubt offensive to others. But so long as the means are peaceful, the communication need not meet standards of acceptability."); *Cohen v. California*, 403 U.S. 15, 21 (1971); *Hill v. City of Houston*, 482 U.S. 451, 461 (1987); *Lewis v. City of New Orleans*, 415 U.S. 130, 134 (1974); *Coates v. City of Cincinnati*, 402 U.S. 611 (1971); *Hustler Magazine v. Falwell*, 485 U.S. 46, 55-56 (1988).

The identity-specific restrictions on speech that an injunctive proceeding may produce are associated with none of the safeguards against illegitimate speech restrictions that are normally associated with legislatively imposed restrictions of general application. As such, they may reflect subtle content-related concerns, and, for precisely that reason, would not ordinarily pass muster if enacted as statutes or ordinances. *See Minneapolis Star v.*

Minnesota Comm'r of Rev., 460 U.S. 575, 585 (1983) ("differential treatment" of speakers "suggests that the goal of . . . regulation is not unrelated to suppression of expression"); *see also Police Department of Chicago v. Mosley*, 408 U.S. 92, 99-102 (1972); *City of Madison v. Wisconsin Industrial Relations Commission*, 429 U.S. 167, 175-76 (1976); *Carey v. Brown*, 447 U.S. 455, 471 (1980); *cf. Arkansas Writers Project v. Ragland*, 481 U.S. 221 (1987); *Leathers v. Medlock*, —— U.S. ——, 111 S. Ct. 1438, 1444-45 (1991) (targeting a small group of speakers for speech-related regulation "raises concerns about censorship of critical information and opinion.").

Moreover, injunctions have procedural consequences different from those of generally-applicable statutes, consequences which have implicit First Amendment and other dangers as well. Those dangers, as applied to injunctions issued in labor disputes, were eloquently summarized by Justice Frankfurter before his accession to the bench, in his classic treatise that led to the enactment of the federal Norris-LaGuardia Act, 29 U.S.C. Sections 101-115:

> The history of the labor injunction in action puts some matters beyond question. In large part, dissatisfaction and resentment are caused, first, by the refusal of courts to recognize that breaches of the peace may be redressed through criminal prosecution and civil action for damages, and, second, by the expansion of a simple, judicial device to an enveloping code of prohibited conduct, absorbing, *en masse*, executive and police functions. Especially those zealots for the unimpaired prestige of our courts have observed how the administration of law by decrees which through vast and vague phrases surmount law, undermines the esteem of courts upon which our reign of law depends. Not government, but 'government by injunction," characterized by the consequences of a criminal prosecution without its safeguards, has been challenged. [Frankfurter & Greene, *The Labor Injunction* 200 (1930).]

In particular, injunctions, unlike criminal statutes, can often be enforced through civil proceedings, without jury trials or a criminal standard of proof. *See generally Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418 (1911). And, at least as a matter of constitutional law, when injunctions are enforced through criminal processes the individual charged with violating the injunction, again unlike the case with criminal statutes, cannot normally defend on the grounds that the injunction violated constitutional rights. *See Walker v. City of Birmingham*, 388 U.S. 307 (1967). Thus, "[t]he impact and consequences of subsequent punishment for . . . abuse [of the freedom to speak] are materially different from those of [injunctions]." *Carroll*, 393 U.S. at 180-181.

As a result of these substantive and procedural considerations and their impact on First Amendment protections, the general rule has been that "ordinarily," the state should not rely on injunctions to serve its interests:

> [T]he state's constitutionally permissible interests are adequately served by criminal penalties imposed after freedom to speak has been so grossly abused that its immunity is breached. [*Carroll*, 393 U.S. at 181.]

b. It is also the case, however, that the context-specific nature of injunctions permits in very narrow circumstances restrictions on speech activity that might not be valid if applied generally. Thus,

> [A] state can choose to authorize its courts to enjoin acts of picketing in themselves peaceful when they are enmeshed with contemporaneously violent conduct which is concededly outlawed. The Constitution [does not] deny . . . the power . . . to prevent the continuance and recurrence of *flagrant violence*, found after an extended litigation to have occurred under specific circumstances. . . . Such a decree, arising out of a particular controversy and adjusted to it, raises totally different constitutional problems from those that would be presented by an abstract statute with an overhanging and undefined threat to

free utterance. [*Milk Wagon Drivers Union, supra,* 312 U.S. at 292 (emphasis supplied).]

Both in *Milk Wagon Drivers* itself and in later opinions, this Court has made clear that the constitutional permission to limit speech in order "to prevent future coercion" (*id.* at 296) is extremely limited and must be exercised with great caution. *Milk Wagon Drivers* involved "violence on a considerable scale", violence that was painstakingly catalogued in the opinion. 312 U.S. at 291; *see also id. at* 295 ("[t]hese acts of violence are neither episodic nor isolated"); 299 ("extensive violence").[18] Under those circumstances, the Court found, even peaceful picketing took on the complexion of a threat, causing "the persons in front of whose premises such picketing occurred . . . to believe that non-compliance would possibly be followed by acts of an unlawful character." 312 U.S. at 294. And the Court took pains to emphasize that only in such unique and limited circumstances could there be such governmental authority to curb speech:

> [T]he right of free speech cannot be denied by drawing from a trivial rough incident or a moment of animal exuberance the conclusion that otherwise peaceful picketing has the taint of force. . . . Right to free speech in the future cannot be forfeited because of dissociated acts of past violence. Nor may a state enjoin peaceful picketing because it may provoke violence in others. . . . In the exceptional cases warranting restraint upon normally free conduct, the restraint ought to be defined by clear and guarded language. [312 U.S. at 293, 296.]

In later cases, the Court has repeated its cautionary words, reiterating that a ban on otherwise lawful, peaceful expressive activity can be justified only where "a pattern of violence was established which would inevitably reappear in the event picketing were later resumed." *Youngdahl v. Rainfair,* 355 U.S. 131 (1957) (declining to permit ban on peaceful picketing under *Milk Wagon Drivers* because "[w]hat violence there was was scattered in time and much of it was unconnected with the picketing");[19] *NAACP v. Claiborne Hardware,* 458 U.S. at 323, 923, 924 n.67 ("This case is not like *Milk Wagon Drivers* . . . in which the Court held that the presence of violence justified an injunction against both violent and nonviolent activity. The violent conduct present in that case was pervasive. . . . [T]he injunction must be modified to restrain only unlawful conduct . . .")[20] *Cf. Carroll,* 393

[18] The violence involved "more than fifty instances of window-smashing; explosive bombs causing substantial injury to . . . plants . . .; [five] stench bombs," as well as several wrecked trucks, arson of a store and two trucks, the beatings of a store-keeper, a trucker, and workers, one shooting and other threatened shootings. 312 U.S. at 291-92.

[19] The record in *Youngdahl* on violence was as follows:

> All was not quiet, however. On one occasion nails were strewn over the company's parking lot and, about a week later, the whole lot was "seeded" with roofing tacks. Tacks were also scattered in the driveway of the plant manager's home and on the driveways of 12 of the nonstriking women employees. One of the pickets told the plant manager that she would 'wipe the sidewalk' with him and send him back to Wisconsin because he was 'nothing but trash.' The plant manager was followed by the strikers each time he left the plant; he also was harassed at night by occasional shouting at his home and by numerous anonymous telephone calls. . . . Shortly after midnight, on the morning of June 20, two women strikers deliberately drove a sharp instrument into two tires of a car owned by the daughter of one of the nonstriking women employees. At about 5:15 a.m., the police were summoned to the plant where they found a five-foot black snake inside the plant beneath a broken window. [355 U.S. at 133-34.]

Youngdahl was a case in which the federal interest in limiting state court injunctions was preemption under the National Labor Relations Act, not the First Amendment as such. This Court has, however, generally treated the protection accorded peaceful expressive activity during labor disputes by the NLRA and by the First Amendment as equivalent for purposes of determining the appropriate reach of state law, as *Youngdahl*'s reliance on *Milk Wagon Drivers* suggests. *See NAACP v. Claiborne Hardware, supra,* 458 U.S. at 918.

[20] The Court in *Claiborne Hardware* characterized the record as showing only "isolated acts of violence during a limited period" (458 U.S. at 924). The record in *Claiborne Hardware* concerning violence and other unlawful acts connected with the challenged

U.S. at 180 (speech loses "the broad guarantee of the First Amendment" only in those "special, limited circumstances in which speech is . . . interlaced with burgeoning violence").

More generally, this Court has cautioned that:

> An order issued in the area of First Amendment rights must be couched in the narrowest terms that will accomplish the pin-pointed objective permitted by constitutional mandate and the *essential* needs of the public order. In this sensitive field, the State may not employ "means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." *Shelton v. Tucker*, 364 U.S. 479, 488 (1960). In other words, *the order must be tailored as precisely as possible to the exact needs of the case.* [*Carroll v. President and Com'rs of Princess Anne*, 393 U.S. at 183-84 (emphasis added)].

In other words, while generally applicable time, place and manner restrictions need not meet a compelling interest/least restrictive alternative standard to be upheld, injunctions that limit expressive activities that are not otherwise unlawful are valid only if—in addition to meeting the standards applicable to time, place, and manner restrictions of general application—the governmental purpose is an "essential" one, unrelated to expression (such as curbing pervasive violence) and the ban on expressive activity *is as narrow as possible* to meet that "essential" purpose.[21]

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boycott included shots fired at several houses, a brick thrown through a windshield, damage to a private flower garden, and two beatings. *Id.* at 903-05.

[21] Even though the standard of scrutiny with respect to speech-restricting injunctions is, for reasons stated in the text, *stricter* than for generally applicable time, place and manner restrictions, a restriction contained in an injunction can be valid although the same restriction contained in a statute or ordinance would not be. The reason for this distinction is that an injunction can be justified by the *particular* circumstances that triggered it, both as to the strength of the state interest and as to the narrow tailoring requirement, and is therefore not susceptible to an overbreadth challenge.

2. While this Court has not had occasion to spell out in detail the application of the *Milk Wagon Drivers/Carroll* standard to concrete situations, several principles are suggested by the injunction cases, by general First Amendment principles, and by the standard itself.

First, to begin with a point that should be obvious but is not uniformly followed, there should be no injunction without an underlying finding that the plaintiffs have made out a pertinent legal cause of action against the defendants who are to be restricted by the injunction. Injunctions are, of course, *remedies* to be imposed once a legal wrong is proven, not an opportunity for free-wheeling determination of social policy by judges. Particularly where speech is at issue, concerns over viewpoint, content, and identity discriminations discussed earlier militate against individualized restrictions on expression applicable only to certain people, and not justified by prior *illegal* activity *by those people*.

Second, except in the "flagrant violence" situation, *see Milk Wagon Drivers*—in which even otherwise peaceful expressive activity can only be taken as a threat of future violence if the demonstrators demands are not met—any injunction should ordinarily be limited, in the first instance, to restraining *illegal* conduct. *NAACP v. Claiborne Hardware*, 458 U.S. at 924 n.67. If and only if that restraint fails to curb the illegal conduct is there any basis at all for believing that a broader injunction is necessary. Moreover, this incremental approach should be required as to *each* aspect of the injunction; the fact that certain illegal conduct continues after the initial injunction would not justify a speech-restricting injunction that controls conduct of a different kind, or in a different location.

Third, only where controlling the unlawful conduct at issue is "essential [to] . . . public order" (*Carroll*, 393 U.S. at 183) can the circumstances justify any sort of prophylactic injunction impinging directly on expressive activity. Thus, only unlawful activity that is continuous,

pervasive, and severely threatening to the safety of others can provide the necessary predicate.

Fourth, to be "tailored as precisely as possible to the exact needs of the case" (*Carroll*, 393 U.S. at 184), *each* aspect of any injunction that affects speech activity should do so in the most measured increments and to the least degree necessary for eliminating the particular intolerable unlawful conduct underlying the injunction. In particular, the physical area covered by any restriction on communicative activity should be as confined as possible and should be based on site-specific justifications. Moreover, the context-specific, precise tailoring that is necessary dictates that, absent the extreme and pervasive violence situation the Court found present in *Milk Wagon Drivers*, peaceful expressive activity should not be *entirely* forbidden within any area.

Fifth, and finally, any injunction issued as a result of unlawful conduct should be carefully limited so that *every* provision that might affect otherwise protected speech is a remediable measure that demonstrably responds to the pervasive unlawful *conduct* that triggered its issuance. There must be a direct, articulable connection between each aspect of the speech-related restriction and increased probability of curbing unlawful conduct. The fact that the defendants engaged in unlawful, enjoinable conduct cannot be deemed to create an open season on the right to engage in expressive activity. And, to underline what should be apparent, protecting others from the *content* of the speech (unless the speech itself is unprotected under the First Amendment) is an impermissible basis for an injunction.

C. *Applying the standards to the buffer zones in this case.* Because the amended injunction's three different "buffer zone" provisions involve somewhat different considerations, we review each in turn.

1. *The 300-foot "buffer zone" around residents:* The original injunction contained no prohibition upon any activity around the residences of clinic staff, nor, it appears,

is there any statute, ordinance, or rule of law applicable in the pertinent areas specifically forbidding in residential areas activity of the intrusive kind proscribed by the statute upheld in *Frisby v. Shultz*. Rather, the trial judge simply concluded, on his own, that the activity enjoined is "impermissible conduct and should be . . . restrained." Pet. App. B-4, B-6.

Thus, there is no finding that the broad prohibition is related in any way to curbing *any* illegal activity, or redressing any legally cognizable wrong. And, since there was nothing in the original injunction pertaining to activity away from the clinic, the residential "buffer zone" cannot be justified as necessary to assure compliance with the earlier injunction. Furthermore, the circle with a three-hundred foot radius surrounding each house, within which communicative activity is broadly banned, is not based on any focused, narrow, site-specific considerations, and, because of its sheer size, would appear to bar *any* meaningful in-person communication by defendants.

These deficiencies in the trial court's approach parallel those this Court has found decisive in prior cases. *See Organization for a Better Austin v. Keefe*, 402 U.S. at 417, 419-20 (holding invalid an injunction against, *inter alia*, passing out leaflets to a real estate dealer's neighbors on their doorsteps "describing his real estate activities and accusing him of being a 'panic peddler,'" stating that "[n]o prior decisions support the claim that the interests of an individual being free from public criticism of his business practices in pamphlets or leaflets warrants use of the injunctive power of a court"); *Frisby v. Shultz*, 487 U.S. at 486 ("generally directed means of communication [including handbilling and house-to-house solicitation] . . . may not be completely banned in residential areas."); *Martin v. City of Struthers*, 319 U.S. 141, 142, 149 (1943).[22]

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[22] Unlike the narrow ban on focused picketing upheld in *Frisby*, the injunction in this case is *not* limited to "picketing focused on, and taking place in front of, a particular residence." 487 U.S. at 483, and *would prohibit* "[g]eneral marching through residential

2. *The 300-foot "buffer zone" around the clinic:* The original injunction prohibited the blocking of ingress to and egress from the clinic and "physically abusing persons entering, leaving, working or using any services" at the clinic. After the hearing on amending the injunction, the trial court found that as a result of the demonstrators' actions, traffic was slowed on the street adjacent to the clinic as it turned into the clinic's driveway and, as that happened, "the vehicle would be approached by persons designated by respondents as sidewalk counselors attempting to get the attention of the vehicles' occupants to give them anti-abortion literature and to urge them not to use the clinic's services." Pet. App. B-3; *see also* Pet. App. B-4 (demonstrators "push[ed] pamphlets in car windows"). The injunction as amended therefore restrained defendants in an area within 300 feet of the clinic, from engaging in conversation with or delivering any literature to any client of the clinic, unless the client affirmatively invites the communication. Pet. App. B-8.

This aspect of the injunction raises constitutional problems similar to those raised by the 300-foot residential buffer zone. Once again, the trial court restrained the activity that the court viewed as "impermissible," with no finding that any legal norm, statutory *or* injunctive, was ever violated. Pet. App. B-6. And once again, there appears to be no site-specific basis for restricting speech in such an extremely wide, 300-foot radius area. Nor is it apparent how the sweeping prohibition is "pinpointed" at curing the cited improper conduct, *viz.*, pressing literature upon individuals through moving car windows and pursuing sidewalk "counseling," even after contact with the "counselors" had been firmly refused; if those were the

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neighborhoods, or even walking a route in front of an entire block of houses," as well as "go[ing] door-to-door to proselytize their views." The "buffer zone" provision, applying the ban only within a 300 foot radius circle, is certainly not sufficient to bring the restriction within *Frisby*: the average suburban home frontage is about fifty feet, so the geographical limitation could ban communicative activity several houses away, or even on the next block or a parallel or perpendicular block.

concerns, the 300-foot clinic buffer zone limitation could have simply prohibited that particular conduct.

Quite aside from this, it is questionable why it is "essential to the public order"—or relevant *at all* to public safety concerns—that individuals seeking the clinic's services be protected from even the *invitation* to read proffered literature or to speak with the demonstrators. To the contrary, the First Amendment has long been understood to protect the right to *approach* other citizens to distribute handbills and discuss ideas. *See International Society of Krishna Consciousness v. Lee,* 112 S. Ct. 2709, 2713-15 (O'Connor, J., concurring) (even in a nonpublic forum, a ban on peaceful leafletting is unreasonable); *id.* at 2720 (plurality opinion) ("the right to distribute flyers and literature lies at the heart of the liberties guaranteed by the . . . First Amendment"); *DeBartolo Corp. v. Florida Gulf Coast Trades Council,* 485 U.S. 568, 575-76 (1988); *Organization for a Better Austin, supra.* As this Court has repeatedly recognized, the burden of refusing to accept a handbill or of listening to non-threatening discussion is not one of great weight in the free speech calculus created by the First Amendment. In contrast, as the Court has also recognized, the demonstrators' right to tell the intended audience that there is something they would like to say to them or material they would like to distribute to them *is* so central to effective communication that a ban on that activity is tantamount to a complete ban on communication with the intended audience within the relevant area. It is doubtful, for example, that clients of the clinic will invite total strangers hundreds of feet from the building to give them reading material they have no reason to know is available.

3. *The 36-foot "buffer zone" surrounding the clinic*: As noted, the original injunction banned obstruction of ingress to and egress from the clinic. After the modification hearing, the trial court affirmatively found that there had been serious and persistent interference with ingress because of demonstrators massed on the vehicle right-of-way adjoining the clinic and in the driveway to the clinics

parking lot. Pet. App. B-2, B-3. The 36-foot buffer zone, within which *all activity* (communicative or otherwise) by defendants was banned, encompassed in part that right-of-way and driveway, while permitting peaceful demonstrations across the 21-foot road from the driveways and on the shoulder of an adjoining access road.

The fact that "traffic [was] slowed . . ., sometimes having to momentarily hesitate or stop" (Pet. App. B-2) is not equivalent to pervasive violence or other major dangers to public order. There was, however, as to this buffer zone, a clear connection between violations of the initial injunction and the scope and content of the subsequent injunction of speech-related activity within the zone. The physical reach of the speech restriction does, on the Dixie Way side of the clinic, directly reflect the configuration of the site: Because of the twenty-one foot vehicular street and the driveways, protecting a more limited area from crowds too large to stay on the sidewalk would not have served to protect the traffic flow.

On the other hand, within the 36-foot "buffer zone", the ban on communicative activity is *absolute*. It is our submission that absent a sustainable finding of pervasive violence like the one in *Milk Wagon Drivers*, there is *no* basis for such an absolute ban. Communication could have been preserved, while eliminating the crowding and congestion that had obstructed traffic, by permitting a small number of peaceful picketers or handbillers within the "buffer zone" area. Doing so would permit the message to be communicated to those approaching the clinic on the clinic side of the vehicular access road.[23] As it stands, then, the 36-foot "buffer zone" provision is not "tailored as precisely as possible to the exact needs of the case" (*Carroll*, 393 U.S. at 184).

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[23] While the 36-foot area is explicable on the sides of the clinic with the driveways and access roads, no such ingress and egress concerns can justify the extension of the "buffer zone" to sides of the clinic not abutting roads.

vision is not "tailored as precisely as possible to the exact needs of the case" (*Carroll*, 393 U.S. at 184).

The Florida Supreme Court did not apply the proper standards in this case. However, since that court did not have a complete record before it (*see*, n.10, *supra*), it had no opportunity to fully consider the constitutional issues raised above concerning the various "buffer zone" provisions, or to consider construing or modifying various provisions of the amended injunction to meet both First Amendment concerns and legitimate injunctive purposes. It therefore may be appropriate for this Court, rather than examining the full record in the first instance, to remand after making clear the proper standards.

CONCLUSION

For the reasons stated above, the case should be remanded to the Florida Supreme Court.

Respectfully submitted,

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(13)

No. 93-880

IN THE

Supreme Court of the United States

October Term, 1993

JUDY MADSEN,

Petitioner,

v.

WOMEN'S HEALTH CENTER,

Respondent.

On Writ of Certiorari to the Supreme Court of Florida

BRIEF OF THE STATES OF FLORIDA, ARIZONA, COLORADO, CONNECTICUT, HAWAII, ILLINOIS, INDIANA, MAINE, MARYLAND, MASSACHUSETTS, MINNESOTA, MONTANA, NEVADA, NEW JERSEY, NEW MEXICO, NEW YORK, NORTH CAROLINA, OHIO, OREGON, RHODE ISLAND, TENNESSEE, TEXAS, VERMONT, WEST VIRGINIA AND WISCONSIN AS AMICI CURIAE IN SUPPORT OF RESPONDENT

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INTEREST OF THE AMICI CURIAE

The *amici* states seek this Court's affirmance of the ruling of the Florida Supreme Court in this case, upholding the amended permanent injunction entered by the trial court on April 8, 1993. This case presents an important vehicle for this Court to uphold the well-established role of state courts to fashion appropriate injunctive relief to deal with specific controversies and threats to public order and safety in their jurisdiction. This court's decision will directly affect the states' ability to avoid disruption of legitimate public services and activities that occur at particular sites, such as medical facilities, voting booths, schools and courts. Resolution of the issues presented will also affect the ability of state governments to promote public health by ensuring citizens access to health care, to ensure public safety by maintaining the free flow of traffic on public streets and sidewalks, to protect the property rights of state citizens, and to protect the state and federal constitutional rights of all state citizens, including a woman's freedom to seek lawful medical or counseling services in connection with pregnancy.

The *amici* states strongly urge this Court to uphold the trial court's measured response in the instant matter, which recognized not only petitioners' constitutional rights, but the significant state interests involved.

STATEMENT OF THE CASE

The April 8, 1993 injunction challenged by petitioners was the third injunction entered by the state trial court in Melbourne, Florida in a suit brought in October 1991 by the Aware Woman Center for Choice (hereinafter "clinic") seeking relief from the activities of petitioners and others who were blocking clinic access and threatening clinic staff and patients as part of a plan to force the closure of clinics performing abortions in the Central Florida area. Each of these remedies was issued only after the court reviewed evidence and made

detailed findings of fact supporting the necessity for the particular relief granted. As the April 8, 1993 injunction itself states, it was issued in response to the refusal of petitioners to abide by the terms of the previous injunction and in response to escalating illegal and threatening actions by petitioners and their associates at the clinic and at the homes of clinic staff and patients.

The First Permanent Injunction

The clinic filed suit in state court October 24, 1991, seeking immediate relief from the activities of petitioners and their associates who were blocking clinic access as part of an announced plan to close abortion clinics in Central Florida. Finding that the situation required prompt relief, the trial court entered a temporary injunction on October 25, 1991. Petitioners moved to dissolve that order and the clinic requested permanent relief. Based on stipulated facts and affidavits submitted by the parties, the trial court entered a permanent injunction on September 30, 1992. J.A. 1.

Petitioners did not then and do not now challenge the findings of fact or prohibitions imposed by the September 1992 injunction. Pet. at 5, n.4. The trial court found that Madsen, Martin and Hobbs are members of Operation Rescue and Operation Rescue America, J.A. 6, and that they had stated an intent to close clinics performing abortions in Central Florida by blocking access in intentional violation of state law. J.A. 5-7, ¶ 2, 5, 7, 8.[1] The court ruled that state criminal prosecution would not adequately protect the civil and property rights of the clinic, its staff, and its patients, J.A. 7-9, and that

[1] The parties' stipulation, submitted July 30, 1992, states, among other things, that "Ed Martin, Judy Madsen and Shirley Hobbs are members of Operation Rescue America," and that "[r]espondents have passed out flyers in the [Melbourne] area stating their desire to close down abortion clinics in this area . . . ." Pet. App. A 2-3, n.2.

an injunction was both necessary and appropriate. *Id.* The court prohibited petitioners from blocking access to clinics or physically abusing persons entering or leaving the clinics, and from directing others to do so. J.A. 7-10. Petitioners do not challenge those conclusions of law or those prohibitions, which are also contained in the amended permanent injunction at issue. Pet'rs Br. at 27 n.19, 28-30.[2]

The Amended Permanent Injunction

On March 22, 1993, the clinic moved to present additional evidence and to modify the injunction, arguing that the September 30, 1992 injunction had not proved sufficient and that petitioners were violating its proscriptions. J.A. 11-49. The clinic alleged that the petitioners' actions had become more menacing since the murder of Dr. David Gunn near an abortion clinic by an anti-abortion activist in Pensacola, Florida on March 11, 1993. J.A. 11-12.[3] The trial court held a three-day evidentiary hearing at which clinic medical staff, local police, and petitioner Martin, among others, testified. As set out below, the testimony of the clinic staff and police established that after the September 30, 1992 injunction, petitioners Martin and Hobbs and other demonstrators organized by Rescue America, had blocked access to the clinic

[2] Despite paragraphs two and four of petitioners' July 30, 1992 stipulation, and paragraphs two and four of the fact findings in the September 30, 1992, order entered against petitioners, petitioners represent to this Court that they are not associated with Operation Rescue. Pet'rs Br. at 3. In light of the *res judicata* effect of the September 30, 1992, order to which these individuals were party, this Court should summarily reject petitioners' assertions that they are not "in concert with" Operation Rescue or its successor, Operation Rescue America.

[3] The alleged new threats included blockading clinic doctors in their homes and tracing patients' license plates through the Department of Motor Vehicles to obtain their home addresses and contact them. J.A. 14, 15.

and otherwise harassed and threatened clinic staff and patients. The trial court entered detailed findings of fact describing the unlawful actions of petitioners and their associates.

Dr. Frank Snydle, who worked at the clinic until the activities of the protestors caused him to terminate his employment, testified that after issuance of the September 30, 1992 injunction, he had seen petitioners Martin and Hobbs, along with other protestors, trying to stop cars from entering the parking lot of the clinic, yelling at patients and medical staff, and attempting to push literature through closed windows of cars. J.A. 145-147, J.A. 192-194. Dr. Snydle recounted that after running this gauntlet, several patients exhibited physical manifestations of anxiety, including hypertension, cardiac arrhythmia, increased respiration, and fear. Dr. Snydle stated that he regularly had to turn away abortion patients because of the surgical risk occasioned by these symptoms of anxiety, which in his medical opinion, were caused by the protestors. He witnessed some patients being turned away from the clinic by the protesters' blockading, screaming and other harassing conduct, and he stated that the risk associated with surgical procedures increased with delay. Dr. Snydle noted that the protestors' blockage would make entry for an emergency vehicle very difficult. J.A. 150-56.

Dr. Snydle stated that he personally had been harassed by petitioner Martin and others. J.A. 156. In February 1993, Dr. Snydle had been physically prevented from leaving his hotel near the clinic to go to work there for half an hour. Dr. Snydle feared for his physical safety during this blockade. J.A. 179.[4] The trial court entered detailed findings of fact crediting Dr. Snydle's testimony on these points. J.A. 53-55.

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[4] Dr. Syndle also testified that after the first permanent injunction, Meredith Raney, another leader of Operation Rescue, followed him by car from the clinic. When Dr. Snydle pulled off the highway, Mr. Raney parked beside him, grinned at him, made a gun hand symbol, and drove away. J.A. 190.

Captain Allgeyer of the Melbourne Police Department testified that, since the September 1992 injunction, systematic anti-abortion protesting ("impact training") organized by Operation Rescue, J.A. 247, and petitioners Madsen and Martin, J.A. 415-16, *see* J.A. 108, 109, had considerably increased the crowds blocking access to the clinics and that the incidence of police reports involving anti-abortion protesters had increased. J.A. 267-68. Captain Allgeyer testified that he had charged petitioner Hobbs with obstructing traffic and blocking clinic access several times. J.A. 275-76. Allgeyer stated that the number of protestors was creating a traffic problem frequently requiring police presence to ensure that emergency vehicles could reach the clinic and to protect pedestrians and motorists. J.A. 259, 263-64. The trial court entered detailed findings of fact crediting Captain Allgeyer's testimony. J.A. 50-52.

The trial court found that in violation of the September 30, 1992 injunction, petitioners and their associates were blocking access to the clinic, and physically abusing and threatening persons seeking access to the clinic. The court found that the noise made by petitioners and their associates was interfering with medical procedures at the clinic and endangering patient care. The court further found that petitioners and their associates were stalking clinic staff and harassing them and their families at their homes. J.A. 55-56.

Having found that the prohibitions of the September 30, 1992 injunction were insufficient, the trial court amended the injunction to prohibit petitioners and those "acting in concert" with them with notice of the injunction[5] from trespassing on clinic property, blocking clinic access, demonstrating within 36 feet of the clinic property on three sides, making noise that

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[5] As discussed below, the amended permanent injunction tracks the language of Fla. R. Civ. P. 1.610(c), which is modeled on Fed. R. Civ. P. 65, in making the injunction binding on those "acting in concert" with the named parties so long as they have notice.

could be heard in the clinic during surgery times as defined in the order, making uninvited contact with persons seeking access to the clinic within a 300 foot zone around the clinic, demonstrating within 300 feet of the homes of clinic staff or threatening clinic staff. The order also contains notice and penalty provisions, and further defines invited contact. J.A. 50-64.

The amended permanent injunction expressly reiterates petitioners' freedom to exercise their First Amendment rights subject to the restrictions. Indeed, the order specifically notes certain areas near the clinic, including a large area five feet from clinic property, where respondents are to be allowed to demonstrate, and requests the city to define a crosswalk to assist petitioners and their associates to reach that area. J.A. 57-58,62.

The Florida Supreme Court and Eleventh Circuit Decisions

On appeal, the Fifth District Court of Appeals certified the trial court's order to the Florida Supreme Court, J.A. 3, and the Florida Supreme Court upheld the injunction. The court reviewed the record and found that the trial court's factual findings were supported by competent and substantial evidence. The Florida high court held that the restrictions were narrowly tailored to address the specific abuses, that the restrictive language of the injunction was content-neutral, that the state had significant governmental interests at stake, that the injunction left open ample alternative means of communication and that the doctrine of prior restraint did not apply. The court also found that the restrictions were not unconstitutionally vague as they were sufficiently specific to put petitioners on notice of the prohibitions, and were fashioned to address specific abuses. Pet. App. A. Madsen, Martin and Hobbs then sought review in this Court.

On April 13, 1993 (five days after issuance of the amended permanent injunction by the state trial court in this

case), Myrna Cheffer filed suit in the United States District Court for the Middle District of Florida challenging the constitutionality of the April 8, 1993 injunction and seeking to enjoin its enforcement. The federal trial court denied Cheffer's motion for injunctive relief and Cheffer appealed. The state moved to dismiss or to affirm for lack of subject matter jurisdiction in light of this Court's decisions in *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923) and *D.C. Court of Appeals v. Feldman*, 460 U.S. 462 (1983), which hold that the lower federal courts have no jurisdiction to review state court decisions, even where those decisions are challenged as unconstitutional. On October 20, 1993, just eight days before the Florida Supreme Court issued its opinion in the state case, the Eleventh Circuit vacated the district court's order and remanded with instructions to consider issuance of a preliminary injunction. *Cheffer v. McGregor*, 6 F.3d 705 (11th Cir. 1993).[6]

The Eleventh Circuit panel held that the injunction is "in effect" a statute -- a conclusory transformation that enabled the court to find standing for Cheffer to challenge the injunction without even alleging that it applied to her, and to find the injunction impermissably viewpoint-based because it does not apply to the world at large. *Id.* As Judge Payne pointed out in dissent, "The majority's unprecedented decision to assume an impossibility -- that a state court judge has passed legislation -- skews its analysis." *Id. at* 714.

SUMMARY OF ARGUMENT

The issues raised in this case stem from the exercise of traditional judicial power to fashion injunctive remedies that respond to specific conditions and circumstances adjudicated

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[6] A week later the Eleventh Circuit summarily denied the state's motion to dismiss. The state's motion for rehearing en banc is still pending.

before the trial court. The trial court's exercise of that power was appropriately fashioned as a patient and incremental response to an escalating pattern of harassing and intimidating conduct accompanying the demonstrations organized by petitioners. As this Court has recognized, the courts have broad remedial power to fashion specific relief in an individual case, based on the evidence submitted and testimony given about the particular circumstances of the claims raised, despite the fact that the relief imposed often has an incidental or even a direct effect upon conduct that has some expressive value. In particular, courts have frequently exercised this accepted power to regulate demonstrations that threaten a continuing disruption of legitimate public services and activities at particular sites, such as schools, medical facilities, courts, voting booths, businesses, and other such facilities. Such power was properly exercised here.

The exercise of traditional judicial power to grant injunctive relief in an appropriate case against conduct that has occurred and is occurring does not constitute a prior restraint upon speech. Nor does it constitute a "legislative" imposition, even if it has incidental effects on the speech or association rights of parties subject to the injunction. Thus, the "overbreadth" arguments asserted by petitioners as though the injunction were a statute or ordinance are fundamentally misplaced. In addition, the trial court's injunctive orders in this case are not framed as "content-based" or "viewpoint-based" directives. Nor are they transformed into "content-based or "viewpoint-based" orders merely because, as injunctive orders entered in a particular case, they are addressed only against those parties whose conduct has been adjudicated in this lawsuit and who have been judged on the evidence presented to be the appropriate objects of injunctive relief.

The Florida Supreme Court correctly held that each restriction of the injunction is necessary to counteract a specific threat to a significant state interest. The trial court

found, and the state high court affirmed, that petitioners' actions and those of their associates threatened the safety of the medical procedures performed at the clinic, prevented patients, clinic staff, and emergency vehicles from access to the clinic, and threatened the safety and privacy of clinic staff and patients in their homes. The state has an unquestionable interest in protecting safe medical services, access to public medical services, and the safety and privacy of citizens in their homes. The injunction's restrictions are, as the state high court found, "no broader then necessary to restrain the unlawful conduct" endangering these interests.

ARGUMENT

As an injunction, the trial court's order restrained only those whose conduct was shown to require restraint. Its case-specific scope does not render it content-based, any more than an injunction against similarly unlawful conduct by "pro-choice," civil rights, union, or any other category of demonstrators would be. And as an injunction, the trial court's order was not "overbroad" just because it was directed at specific persons and groups shown to have acted unlawfully and those acting in concert with them. The *only* question here is whether the injunction was an appropriate response to an escalating pattern of harassing and intimidating conduct accompanying the demonstrations organized by petitioners. Because the trial court's findings of fact show that the injunction is narrowly tailored to protect significant state interests endangered by the actions of petitioners, the injunction should be upheld.

I. THIS CASE INVOLVES THE EXERCISE OF TRADITIONAL JUDICIAL POWER TO FASHION INJUNCTIVE REMEDIES THAT RESPOND TO SPECIFIC CIRCUMSTANCES ADJUDICATED BEFORE THE COURT.

A. The Courts Have Frequently And Traditionally Exercised Their Broad Equitable Powers To Prevent Or Minimize Continuing Disruption of Legitimate Public Activities At Particular Sites, Such As Medical Facilities, Businesses, Schools, And Courts.

It is broadly accepted that when the government acts to restrain harmful conduct, it has the authority to do so despite any incidental or even direct impact on First Amendment rights. *See, e.g., Wisconsin v. Mitchell*, 113 S. Ct. 2194 (1993) (hate crimes); *United States v. O'Brien*, 391 U.S. 367 (1968) (burning draft card); *United States v. Gilbert*, 813 F.2d 1523 (9th Cir.), *cert. denied*, 484 U.S. 860 (1987) (harassment with intent to intimidate). In particular, it is well-recognized that courts acting in equity have broad traditional powers to fashion specific relief in response to existing circumstances that have been adjudicated before the court. *See, e.g., Milk Wagon Drivers Union v. Meadowmoor Dairies, Inc.*, 312 U.S. 287, 294 (1941); *Renegotiation Bd. v. Bannercraft Clothing Co.*, 415 U.S. 1 (1974). As the Florida Supreme Court accurately observed in this case, if the threshold requirements for an injunction are met, "the court has wide discretion in fashioning an appropriate remedy,"[7]

[7] The broad and accepted scope of the equitable power to fashion an appropriate injunctive response to specific circumstances is clearly seen by comparing it to the narrower and more sensitive power of the courts to enforce judicial orders by contempt sanctions. Although this Court has cautioned that the contempt powers should be wielded in such a manner as to invoke "the least possible power adequate to the end proposed," *Spallone v. United States*, 493 U.S. 265, 276 (1990) (quotation omitted), and the outer limits of such powers are subject to some controversy, *see Bagwell v. International Union, United Mine Workers*, 244 Va. 463, 423 S.E. 2d 349 (1992), *cert. granted*, 113 S. Ct. 2439 (1993) (No. 92-1625), even the undisputed parameters of such powers are clearly formidable. *See Spallone*, 493 U.S. at 277-78; *United States v. United Mine Workers*, 330 U.S. 258 (1947). A fortiori, the more basic power to fashion injunctive relief appropriate to govern a particular factual situation involving private parties is properly afforded considerable deference as a traditional power of the courts. *See, e.g., Milk Wagon Drivers Union v. Meadowmoor Dairies*, 312 U.S. 287 (1941).

subject to the constraint that the injunction must be "carefully tailored to remedy only the specific harms shown." Pet. App. A-11; *see Meadowmoor*, 312 U.S. at 298 ("An injunction so adjusted to a particular situation is in accord with the settled practice of equity. . . .")

The relative paucity of cases from this Court involving First Amendment challenges to injunctive relief suggests the accepted broad scope of the lower courts' discretion in fashioning such relief based on particular findings of fact. The few cases from this Court that involve First Amendment challenges to injunctive relief are extreme cases: they involve facts far more egregious, and injunctions far more sweeping, than this case presents. *Compare Meadowmoor*, 312 U.S. 287 (upholding injunction barring all picketing in the state by a labor union in response to extensive violence) *with Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971) (vacating injunction that prohibited all leafletting by a particular group before it had even occurred).[8]

[8] Petitioners rely on *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 924 (1982), in which this Court vacated an award against the NAACP and named persons for all business losses sustained by certain merchants during a largely peaceful seven-year boycott. This Court held the damages award was irrational and an abuse of discretion ("screens reality") because the trial court failed to attribute any portion of that loss to voluntary action

The broad equitable powers of the courts have frequently been invoked to control expressive conduct when necessary to prevent or minimize any continuing disruption of legitimate public services and activities at particular sites. This Court has emphasized that even in the context of a public forum, the proper analysis of government restraints on allegedly expressive conduct examines the effects of the particular expressive conduct at issue on the public activities typically occurrng at that location. "The crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time". *Grayned v. City of Rockford*, 408 U.S. 104, 116 (1972) Accordingly, in reviewing demonstrations at schools, protests at government facilities, labor disputes, and picketing against medical facilities such as occurred in this case, the Court has repeatedly indicated that the traditional injunctive powers of the courts can properly be exercised to ensure that the ordinary and legitimate activities that occur at these locations will not be significantly disrupted by expressive conduct that the court finds disruptive of such activities.

In *Grayned*, for example, this Court upheld a criminal ordinance that prohibited all picketing or other demonstrations within 150 feet of a school building during school hours, even though it concededly prohibited "some picketing that is neither violent nor physically obstructive." 408 U.S. at 120. Since *Grayned*, courts have regularly granted injunctions that bar such activities within a buffer zone around a school building to prevent disruption of school activities during school hours.

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in response to peaceful picketing. *Id.* at 924. The trial court also had granted an injunction against those engaged in the boycott, but the propriety of that injunction was not at issue before this Court, *id.* at 893-96 and n. 18, and thus was addressed only in passing. For this reason, the case is not authority on the issue of what limits the First Amendment imposes on the broad equitable powers of a court to fashion injunctive relief in response to specific circumstances adjudicated before the court.

See, e.g., Pickens v. Okolona Mun. Separate Sch. Dist., 594 F.2d 433, 437 (5th Cir. 1979) (upholding one-block buffer zone around school). Such orders are entirely appropriate when entered in response to specific conditions adjudicated before the court. In some cases, courts have found it necessary to protect school premises by punishing nonparties to an injunction in contempt proceedings where those persons violated injunctions designed to protect schoolchildren's access to class by insulating the school premises against outside agitation. *United States v. Hall*, 472 F.2d 261 (5th Cir. 1972). In judging whether any such further steps are "the least possible power adequate to the end proposed," *Anderson v. Dunn*, 19 U.S. 204, (1821), there is little doubt that the trial judge is best situated to determine the exigencies at hand.

Courts have also frequently been called upon to use their power to protect government facilities against disruptive protest activities on or about their premises. In *Cox v. Louisiana*, 379 U.S. 559 (1965), this Court relied on "the special nature of the place" to uphold limitations on picketing in or near a courthouse. *Grayned*, 408 U.S. at 120. In *Cameron v. Johnson*, 390 U.S. 611 (1968), this Court upheld limitations on picketing that was conducted in such a manner as to obstruct or reasonably interfere with free ingress or egress to a courthouse. And in *Burson v. Freeman*, 112 S. Ct. 1846 (1992), this Court upheld a statute prohibiting political speech within 100 feet of the entrance to a polling place, relying on the states' widespread and long-standing experience that some restricted zone around polling places is necessary to protect the right to vote free of intimidation and fraud.

In labor disputes, it is common for courts to intervene where striking workers are engaged in picketing and patrolling the premises at their worksite. *See, e.g. Carpenters' Local No. 33 v. NLRB*, 873 F.2d 316 (D.C. Cir. 1989). In many states, the exercise of such equitable power in labor disputes has been sanctioned by legislation specifying that peace orders can be imposed in labor disputes involving picketing and

patrolling. *See, e.g.*, Fla Stat. §§ 447.09 (12), (13); 447.17 (2) (1993); Iowa Stat. § 732.5 (1993); N. M. Stat. § 50-2-2 (1993); Va. Stat. § 40.1-83 (1993). In nonlabor disputes, also, courts have enjoined demonstrations and similar activities from disrupting legitimate business activities. *See, e.g.*, *Resident Advisory Bd. v. Rizzo*, 503 F. Supp. 383 (E.D. Pa. 1980) (buffer zone granted that barred picketing and demonstrations in specified areas around site where townhouses were being constructed to prevent disruption).

Cases that involve injunctive orders aimed at protecting public services provided at medical facilities are nothing more than standard applications of the same approach. The lower federal courts have routinely upheld injunctions designed to protect the integrity of medical services at clinics such as this one. *See, e.g., Northeast Women's Center, Inc. v. McMonagle*, 939 F.2d 57 (3d Cir. 1991) (500-foot buffer zone around clinic); *Medlin v. Palmer*, 874 F.2d 1085 (5th Cir. 1989) (restricting activities within 150 feet of clinic); *Portland Feminist Women's Health Ctr. v. Advocates for Life, Inc.*, 859 F.2d 681 (9th Cir. 1988) (limitation on picketing outside clinic).[9] These cases do not present isolated examples of rogue judges entering orders insensitive to constitutional rights; to the contrary, they follow a long line of cases in which state and federal courts have carefully crafted relief appropriate to the particular facts to protect schools, government, courts or other important public facilities from recurring instances of harassing and intimidating conduct accompanying demonstrations. Where such harassing and intimidating conduct is repeated and intransigent, as in this case, an effective judicial response is

[9] *See also* Pet. App. A-24; *Hirsh v. City of Atlanta*, 261 Ga. 22, 401 S.E.2d 530, (demonstrations restricted outside clinic); *cert. denied*, 112 S. Ct. 75 (1991) *Planned Parenthood v. Operation Rescue*, 406 Mass. 701 550 N.E.2d 1361 (1990) (same); *Bering v. Share*, 721 P.2d 918 (Wash. 1986), *cert. dismissed*, 479 U.S. 1050 (1987) (same).

clearly warranted.[10]

In this case, acts that constituted intimidation, harassment, physical abuse, and threats of violence were repeatedly documented by the trial court in granting not one, not two, but three separate injunctions after full judicial hearings on the facts of this case. Such acts, even if they accompanied expressive conduct, were entirely incompatible with the central purpose of this facility, which is to provide medical services, and in particular abortion services, to patients who seek such services. It was thus appropriate for the trial court, confronted by these continuing disruptive actions, to grant successively broader injunctions designed to meet the problems presented as directly and efficiently as possible.[11] The equitable orders granted here did so, and were therefore proper.

[10] Repeated expressive conduct, in itself, often is judged by the courts to constitute harassment properly subject to restriction. *See, e.g.*, *In re Sassower*, 114 S. Ct. 2 (1993) (per curiam) (repeated legal filings may be enjoined); *In re McDonald*, 489 U.S. 180 (1989) (per curiam) (same); *Sassower v. Abrams*, 833 F. Supp. 253 (S.D.N.Y. 1993) (injunction granted to allow other federal courts summarily to dismiss lawsuits filed involving specified subject matter). Similarly, courts routinely grant restraining orders, enforceable in criminal contempt proceedings, that direct one party not to annoy or disturb another or to approach within a specified distance of the other party's residence or workplace. *See, e.g., United States v. Dixon*, 113 S. Ct. 2849, 2854-55 (1993). *See also People v. Smith*, 392 N.Y.S.2d 968, (telephone harassment not protected by First Amendment) *cert. denied*, 434 U.S. 920 (1977).

[11] Conversely, if a court or government entity were to refuse to accord this traditional protection to legitimate activities such as the provision of medical and abortion services at these clinics, the clinics could argue that the government is unconstitutionally sanctioning conduct that creates an "undue burden" on the right to obtain an abortion, as explicitly discussed in this Court's recent decisions. *See Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2821 (1992) (plurality opinion).

II. THE EXERCISE OF TRADITIONAL JUDICIAL POWER TO GRANT INJUNCTIVE RELIEF IN AN APPROPRIATE CASE DOES NOT CONSTITUTE A "LEGISLATIVE" RESTRICTION AND IS NOT "VIEWPOINT-BASED," EVEN IF IT RESTRICTS SPEECH BY PARTIES SUBJECT TO THE INJUNCTION.

A. The Injunction is Not a Statute.

The Florida Supreme Court properly treated the third injunction granted in this case as a fairly standard order fashioning an equitable remedy to control proven disruptive conduct, on the basis of extensive findings of fact. Nonetheless, the Eleventh Circuit, reviewing the third injunction granted in this case, declared that the trial judge "in effect, created a criminal statute prohibiting `pro-life' free speech activity" at this medical facility. *Cheffer*, 6 F.3d at 708. The Court of Appeals proceeded to analyze this third injunction as if it were a criminal statute. *Id.* at 708, 712. That approach -- which petitioners adopt in this case -- is in error and skews petitioners' analysis.

Unlike a statute, which can be challenged "on its face," an injunction is by definition "as applied"; it *is* the application of law to specific facts proven in a particular case. Indeed, any "as applied" analysis occurs upon the issuance of an injunction, when the trial court adjudicates the underlying facts and determines the appropriate remedy. The only question on review is whether the equitable remedy fashioned by the trial court fits the facts of the case. As the Florida Supreme Court correctly noted, the fact-sensitive nature of this task demands that the trial court's on-the-spot resolution of this issue be afforded deference by reviewing courts. Pet. App. A-11; *Meadowmoor*, 312 U.S. at 294.

B. The Injunction Is Not Content- Or Viewpoint-Based.

The injunctive orders issued by the trial court in this case have nothing to do with the content of any speech or expression. They are directed instead at the particular actions engaged in by petitioners and their associates in the immediate vicinity of this medical facility that created a risk to public health and safety. The conduct prohibited by the amended permanent injunction includes entering the clinic premises; blocking or interfering with access to these medical facilities and similar conduct at the homes of clinic staff or patients; blocking and crowding in the street and sidewalk approaching the clinic; and harassment, intimidation, and physical abuse directed at patients or clinic staff, particularly at their homes and places of work. The injunction restricts this harmful and disruptive conduct without reference to the content or viewpoint being advanced.

As the Florida Supreme Court properly reasoned, these orders cannot be characterized as "content-based," let alone as "viewpoint-based." Pet. App. A-14-15. To state the obvious, "[i]t is true that this injunction applies only to [the persons named therein], but that is because it is only those persons who the Center has proved have created and are continuing to create a threat of violence and intimidation." *McMonagle*, 939 F.2d at 63. The petitioners argue that the injunction is content-based because it enjoins the harmful conduct of certain persons who hold a particular view on abortion. *See Cheffer*, 6 F.3d at 710-11. *Contra*, *Portland Feminist Women's Health Center*, 859 F.2d at 686; *McMonagle*, 939 F.2d at 63. The fundamental error in petitioners' and the Eleventh Circuit's analysis is, again, that they treat the injunction like a statute. A statute barring only petitioners from the buffer zone might well be susceptible to constitutional challenge as content-based. But the instant injunction properly confines its prohibitions to those before the court whose conduct required restraint, and

cannot be attacked as content- or viewpoint-based simply because no persons holding different views were shown in this action to have violated the law. Similar complaints raised in other cases under the Equal Protection Clause have been soundly rejected. *See, e.g., Pickens*, 594 F.2d at 438.

Petitioners argue that the injunction's extension of its prohibitions to persons acting in concert with the named parties, with notice of the injunction, renders it viewpoint-based. But it is commonplace for injunctive orders, following the explicit authority of the applicable rule, to restrain not only parties but also "those persons in active concert or participation with them who receive actual notice of the order." Fed. R. Civ. P. 65; Fla. R. Civ. P. 1.610(c); *cf. Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 693 n.32 (1979). The rule allows courts to extend the injunction to persons 'acting in concert" with notice to preserve the common law doctrine that "defendants may not nullify a decree by carrying out prohibited acts through aides and abettors, even though they were not parties to the original proceeding." *Regal Knitwear v. NLRB*, 324 U.S. 9, 14 (1945). To say that such an order cannot be entered because it is "viewpoint-based" is to say that no striker picketing can ever be enjoined because management is not so enjoined. Any such suggestion is clearly wrong.[12]

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[12] Petitioners argue that the court's comments made at post-order, non-evidentiary, preliminary hearings which followed the arrests of 50 people who violated the injunction show that the court intended the injunction to apply to all those with pro-life beliefs. This hearing was not before the Florida Supreme Court and is not part of the record in this case. In any event, petitioners have lifted the comments out of context. A complete examination of the dialogue at the April 12, 1993, hearing shows that the trial court intended the injunction to apply only to those "in concert with" the named respondents, and that the trial court explained to the arrestees that the injunction would not apply to them if they were not "in concert with" the named parties. J.A. 68, 74 (excerpts only).

C. **The Injunction** is Not Overbroad.

Petitioners also argue, relying on *Cheffer*, that the injunction's application to those "acting in concert" with notice of its provisions renders it overbroad. Again, petitioners erroneously treat the injunction as a statute; but unlike a statute, an injunction is binding only on those within its scope. Application of this injunction to a pro-life protester not "acting in concert" with one of the named parties, as that term has been defined by the courts,[1] would exceed the authority of the injunction. Conversely, the mere fact that the injunction extends to those "acting in concert" with the named parties, as expressly authorized by the rule, does not render it overbroad. *See Regal Knitwear*, 324 U.S. at 13-14.

Moreover, the specific facts of this case clearly warranted the extension of the injunction's prohibitions to those "acting in concert" with Operation Rescue and Rescue America. The evidence showed that the unlawful activities at issue were organized by Operation Rescue. J.A. 247-51, 269-70. Thus, there was a specific danger proven in this case that the named defendants would "nullify [the injunction] by carrying out prohibited acts through aiders and abettors," *Regal Knitwear*, 324 U.S. at 14, unless prevented from doing so.[2]

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[1] *See, e.g. Portland Feminist Women's Health Center*, 859 F.2d at 687, (defining scope of "acting in concert"); *United States v. Hall*, 472 F.2d 261 (5th Cir. 1972) (same).

[2] Similarly, this evidence warranted the injunction's prohibition on petitioners' soliciting others to commit the prohibited acts.

D. The Injunction Affords Petitioners Ample Alternative Means to Express Their View Near the Clinic.

The injunction carefully respects the First Amendment rights of petitioners while protecting the significant state interests identified by the trial court. *See* pp. 24-30, *infra*. The injunction clearly reflects the trial court's conscientious balancing of petitioners' rights to express their views and to associate, against patients' rights to obtain, and the clinic's right to provide, necessary medical services. Moreover, as shown above, the injunction is similar to other injunction issued by trial courts in similar circumstances; its provisions do not stand out as extreme. *Compare McMonagle, supra, Portland Feminist Women's Health Center*, 859 F.2d at 681; *Bering v. Share*, 721 P.2d 918 (Wash. 1986); *Parkmed Co. v. Pro-Life Counselling, Inc.* 91 A.D. 2d 551, 457 N.Y.S. 2d 27 (A.D. 1982).

The injunction clearly states that petitioners may engage in First Amendment activities in the vicinity of the clinic. As the Florida Supreme Court noted,

> Operation Rescue is entirely free to do the following at any time on any day: place an unrestricted number of picketers along the south edge of Dixie Way and both the east and west edge of U.S. A; engage in singing, chanting, and whistling, as long as it cannot be heard inside the Clinic during the designated times; engage in "sidewalk counseling" of any Clinic patient who invites contact outside the five-foot and thirty-six-foot buffer zones; and picket in the neighborhoods of Clinic workers outside the three-hundred-foot buffer zone. Pet. App. A-19.

See also Heffron, 452 U.S. at 654-55; *Bering*, 721 P.2d at 930; *Medlin*, 874 F.2d at 1090.[15]

E. The Injunction Is Not a Prior Restraint.

As established in this Court's previous decisions, a "prior restraint" on speech is generally an absolute prohibition laid down on the basis of the content of the speech before the speech or publication may occur at all. *Alexander v. United States*, 113 S. Ct. 2766, 2771 (1993). Because they are imposed before the fact, are content-based, and do not provide adequate alternative means for communicating the ideas restrained, prior restraints are strongly disfavored in the law. *See, e.g., New York Times Co. v. United States*, 403 U.S. 713 (1971).

The instant injunction, however, does not suffer from these defects. Just as the post-hoc remedy accorded here cannot be analyzed as a legislative enactment, it also cannot be equated to a prior restraint; injunctions are remedies accorded after the fact, and, as the Florida Supreme Court correctly understood, "lie[ ] within the sound discretion of the trial court and will be affirmed absent a showing of abuse of discretion." Pet. App. A-11. *See Meadowmoor*, 312 U.S. at 294; *McMonagle*, 939 F.2d at 57.[16]

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[15] The express provision of a location five feet from the clinic for petitioners to demonstrate also undercuts any argument that the injunction improperly targets their viewpoint. As Justice Powell observed in *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976), if the trial court "had been concerned with restricting the message purveyed by the [protestors], it would have tried to [remove] them or restrict their number rather than circumscribe their choice as to location." Id. at 82 n.4.

[16] Petitioners argue that the Florida Supreme Court erred in adopting the reasoning of *McMonagle* on this point, but none of petitioners' authorities suggest any different analysis. The activities that were restricted here were not mere "peaceful pamphleteering" that created no disruptions or disturbances, as in *Organization for a Better Austin*, 402 U.S. at 417-19. They were found instead to include repeated instances of

All persons subject to the injunctions here were permitted to exercise their rights freely through their speech and their conduct at this medical facility, until a lawsuit was eventually brought to determine whether their particular conduct at that site constituted an abuse of those rights. After the trial court had heard evidence about the activities that had occurred, it determined that specific time, place and manner restrictions on those activities were necessary to protect persons and activities at this medical facility, and laid down such constraints in three successive injunctions, all imposed after the trial court had fully adjudicated the circumstances. This case thus presents the kind of "judicial determination in an adversary proceeding" that "suffices to impose a valid final restraint." *Freedman v. Maryland*, 380 U.S. 51, 58 (1965).

Furthermore, the prior restraint doctrine is inapplicable because the instant injunction is content neutral and allows petitioners ample alternative means to express their views near the clinic, as discussed above. *See also Alexander*, 113 S. Ct. at 2772-73 & n.2 (rejecting the "essentially limitless expansion of the term [prior restraint] that petitioner proposes"). Thus, far from involving a prior restraint, this case involves reasonable time, place and manner restrictions, imposed after the fact -- after petitioners had repeatedly turned opportunities for expression into acts of disruption.

F. The Injunction Provides Adequate Notice to Petitioners of the Conduct Prohibited.

A government restriction is vague if it "either forbids or requires the doing of an act in terms so vague that men of

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intimidation, harassment, and threats of violence, *see* Pet. App. A-23-24. *Carroll v. Presidents & Comm'rs of Princess Anne*, 393 U.S. 175 (1968), hinged on the fact that no notice of the injunction was provided to those enjoined; and *Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969), involved a local ordinance which was overbroad, and thus facially void.

common intelligence must necessarily guess at its meaning and differ as to its application." *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926). The vagueness doctrine is based on due process principles that require fair notice and warning, and sufficient specificity to avoid arbitrary and discriminatory enforcement. *Smith v. Goguen*, 415 U.S. 566 (1974). "The normal standard of specificity required for an injunction is that 'the party enjoined must be able to ascertain from the four corners of the order precisely what acts' are forbidden." *In re Baldwin-United Corp.*, 770 F.2d 328, 339 (2d Cir. 1985). To the extent there is any doubt as to what the trial court intended, the injunction should be construed narrowly. *Ibid.*

In the Florida Supreme Court, petitioners challenged as vague the ban on "sounds or images observable to or within earshot of the patients inside the Clinic;" the ban on "physically approaching any person seeking the services of the Clinic" within 300 feet of the clinic, and the ban on demonstrating within 300 feet of the residences of clinic staff.[17]

The first ban is sufficiently specific to put petitioners on notice that loud noises during surgery and recovery would not be tolerated and signs could not be displayed from ladders above the clinic's fence in such a manner that patients were forced to observe them during surgery and recovery. Further specificity is not required. *See McMonagle*, 939 F.2d at 72 (upholding identical ban); *Portland Feminist Women's Health Center*, 859 F.2d at 685 (rejecting claim that injunction was impermissibly vague for failing to provide a specific decibel level for prohibited sounds; "Greater particularity, while it may be desirable, is not required under Rule 65(d).")

The second and third bans were fashioned to combat

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[17] To the extent petitioners now seek to challenge additional provisions as vague, this Court should not entertain such new assertions not raised below.

the specific abuses described above, and each provides reasonable notice of the behaviors that would not be tolerated. "Condemned to the use of words, we can never expect mathematical certainty from our language. The words of the [ban] are marked by 'flexibility and reasonable breadth, rather than meticulous specificity,' [and] . . . it is clear what the [ban] as a whole prohibits." *Grayned*, 408 U.S. at 110. *See Medlin*, 874 F.2d at 1091. "Those subject to [the] strictures [of the injunction] have adequate notice of what is required of them, and sufficient assurance of the direction enforcement will take." *Portland Feminist Women's Health Center*, 859 F.2d at 687.

III. THE INJUNCTION IS NARROWLY TAILORED TO PROTECT SIGNIFICANT STATE INTERESTS THREATENED BY THE CONDUCT OF PETITIONERS.

The Florida Supreme Court found that the instant injunction is necessary to protect several significant state interests: protecting the state and federal constitutional rights of all Florida citizens, which include a woman's freedom to seek lawful medical or counseling services in connection with pregnancy, ensuring public safety and order, promoting the free flow of traffic on public streets and sidewalks, and protecting the property rights of all Florida's citizens. Pet. App. A-15-16. As this Court has recognized, the state's interest in maintaining order and public safety includes not only the prevention of criminal acts, but also the state's interest in ensuring traffic and crowd control, keeping open public access to buildings providing public services, prevention of excessive noise levels, protection of property rights and the privacy of the home, and ensuring appropriate medical standards. *Bray v. Alexandria Women's Health Clinic*, 113 S. Ct. 753 (1993) (Kennedy, J., concurring); *Gregory v. Chicago*, 394 U.S. 111, 118 (1969) (Black, J. & Douglas, J.,

concurring). Each of the provisions in the injunction serves a state interest that this Court has recognized as significant.

The Florida Supreme Court also correctly found that the injunction was "no broader than necessary to restrain the unlawful conduct," Pet. App. A-11, and that each of the restrictions was necessary to counteract a specific danger to a significant state interest created by petitioners' actions since the September 30, 1992 permanent injunction. Pet. App. A-16-19. The injunction specifically protects petitioners' First Amendment rights, including their right to demonstrate near the clinic.

A. Each Prohibition of the Injunction Is No Broader Than Necessary to Protect The Significant State Interest At Stake.

1. Petitioners Concede The Prohibitions on Trespassing or Blocking Access Are Narrowly Tailored To Ensure Access to Public Services.

The injunction prohibits petitioners from entering the clinic property or blocking access to the clinic. J.A. 57. Petitioners concede the validity of these provisions, Pet. Br. at 27 n.19, 28-30, as indeed they must, there is no First Amendment right to trespass or block ingress and egress. *See Cameron*, 390 U.S. 611 (upholding law that prohibited picketing in front of a courthouse unreasonably interfering with free ingress or egress); *Cox*, 379 U.S. 559 (demonstrators may not cordon off street or entrance to a building allowing no one to pass who refused to listen to them). Consequently, paragraphs one and two of the injunction should be affirmed.

2. The 36-Foot Buffer Zone Is Narrowly Tailored to the Need for Traffic and Crowd Control.

The injunction prohibits petitioners from demonstrating within 36 feet of the clinic property on three sides. The buffer zone keeps petitioners off the street in front of the clinic (Dixie Way), out of the entrances to the clinic's two parking lots and away from their perimeter. The restriction expressly provides that petitioners may demonstrate up to five feet from the clinic property line on the fourth side and requests the city to create a crosswalk to assure petitioners' safety and ease of access to this area. J.A. 57-58.

As the trial court found, testimony during the three day evidentiary hearing conclusively established the heavy traffic conditions on Dixie Highway in front of the clinic, the high number of protestors near the clinic and the resultant danger of injury to pedestrians, and the risk that emergency vehicles would not be able to reach the clinic if Dixie Way or the clinic parking lots were blocked. J.A. 50-53, 55; *see* J.A. 236-317 (testimony of Captain Allgeyer). The state's interest in the orderly movement and control of such a situation is a "substantial consideration." *Heffron v. International Soc'y for Krishna Consciousness*, 452 U.S. 640 (1981). *See also Cameron*, 390 U.S. at 611; *Planned Parenthood v. Project Jericho*, 52 Ohio St. 3d 56, 556 N.E.2d 157 (1990) (significant state interest in ensuring that trade and commerce, including the provision of medical services, are conducted unimpeded by breaches of peace and threats to safety of those engaged in or patronizing lawful business).

The buffer zone is consistent with similar remedies ordered by other lower courts in such situations. *See, e.g. Portland Feminist Women's Health Center*, 859 F.2d at 681 (upholding a over twelve foot "free zone"); *Thompson v. Police Dept. of New York*, 145 Misc. 2d 417, 546 N.Y.S. 2d 945 (1989) (upholding buffer zone in front of clinic entrance). The exact dimensions of such a buffer zone will, of course,

vary with the layout of the particular site, and with the particular dimensions of the problems of access and crowd control. There is no basis for this Court to second-guess the trial court's 36-foot line on three sides of the clinic. *See Burson v. Freeman*, 112 S. Ct. at 1857; *Portland Feminist Women's Health Center*, 859 F.2d at 686.

3. The Prohibitions on Noise That Disrupts Surgical Procedures and on Harassing Patients and Clinic Staff Ensure Safe Medical Procedures.

The injunction prohibits petitioners from making noise that can be heard in the clinic or presenting images visible from the clinic during surgery and recovery times as defined in the order. J.A. 59.

As the trial court found, the noise level created by the Rescue America demonstrations organized by petitioners was very high; it included amplified sound and persons standing on ladders shouting over the clinic fence. J.A. 52, 53. The trial court further found, based on Dr. Snydle's testimony, that many patients had high anxiety levels manifested by physical symptoms, that these symptoms were caused or exacerbated by the noise and signs of petitioners, and that the risks associated with surgical procedures performed by the clinic were increased when procedures were performed on patients with increased anxiety levels. J.A. 54. As the Florida Supreme Court noted, the prohibition on displaying "images observable" by patients in the clinic during surgery and recovery periods is clearly targeted at the display of signs from ladders above the clinic fence. Pet. App. A-21. These findings justified the measures enunciated in paragraph four of the injunction.

This Court has previously recognized that safeguarding patient health and maintaining medical standards are important government interests that can justify restrictions on expressive

conduct. *NLRB v. Baptist Hospital*, 442 U.S. 773 (1979). Legal abortions are no exception. *Roe v. Wade*, 410 U.S. 113 (1973). *See Lewis v. Pearson Foundation*, 908 F. 2d 318 (8th Cir. 1990) (state has significant interest in protecting access to legal abortion); *Portland Feminist Women's Health Center*, 859 F.2d 681 (9th Cir. 1988) (protecting rights of clinic and its patients to safe medical services are important interests); *see also Planned Parenthood v. Operation Rescue*, 406 Mass. 701, 550 N.E.2d 1361 (1990); *Bering v. Share*, 106 Wash. 2d 212, 721 P.2d 918 (1986), *cert. dismissed*, 479 U.S. 1050 (1987)

This Court has also recognized a state's significant interest in controlling disruptive sound levels, especially where, as here, there is a "captive audience," and the noise is preventing the smooth functioning of a public service. *See Grayned v. Rockford*, 408 U.S. 104 (ordinance that prohibited conduct tending to disrupt classwork upheld due to significant state interest in undisrupted school sessions); *Medlin v. Palmer*, 874 F.2d 1085 (protecting patients of hospitals and clinics from unwarranted intrusion of noise generated by pro-life activists are significant state interests); *See also Portland Feminist Women's Health Center*, 859 F.2d at 685; *Eanes v. State*, 318 Md. 436, 569 A.2d 604, *cert. denied*, 110 S. Ct. 3218 (1990).

The same evidence of increased patient anxiety and increased surgical risk and the same state interest in assuring proper medical care sustain the provisions of the injunction that prohibit petitioners from assaulting, threatening or harassing patients entering the clinic or from communicating with patients within 300 feet of the clinic unless invited to do so. J.A. 59-60. The trial court found that some patients were turned away from the clinic by the protestors, and that many of those who entered the clinic suffered from anxiety and hypertension. The delay and the anxiety so caused increased the risk of the surgical procedure. J.A. 54. The prohibitions on harassing patients in paragraphs five, seven, and eight of

the injunction specifically address these problems.

As the Florida Supreme Court correctly held, Florida citizens are entitled to unimpeded access to licensed medical facilities and to freedom from unwanted confrontations and communications when undergoing lawful medical treatment, particularly where the effect of such confrontations is to place the patient's health and safety in jeopardy. Pet. App. A-15-16, citing *Frisby v. Schultz*, 487 U.S. 474 (1988); *see Roe v. Wade*, 410 U.S. at 113 (safeguarding patient health and maintaining medical standards are important government interests).

The protections of the injunction that prohibit assaulting or threatening clinic staff, J.A. 60 (¶¶ 7,8), also, obviously, serve the same state interest in assuring medical care as well as protecting the rights of citizens to conduct their affairs free of physical harm and harassment or intimidation. "[A] physical assault is by no stretch of the imagination expressive conduct protected by the First Amendment." *Wisconsin v. Mitchell*, 113 S. Ct. at 2199.

4. The Prohibitions on Demonstrating In Front of Doctors' Homes or Harassing Their Families Protect Property and Privacy Rights.

The injunction prohibits petitioners from demonstrating within 300 feet of the homes of clinic staff or owners, blocking access to their homes, or assaulting or intimidating their families and guests.

There is little question that the state's interest in protecting the well-being, tranquility, and privacy of the home is "of the highest order in a free and civilized society." *Carey v. Brown*, 447 U.S. 455, 471 (1980). In *Frisby*, this Court observed that one important aspect of the notion of residential privacy is the protection of the unwilling listener: although individuals can simply avoid unwanted speech in many areas, "the home is different." 487 U.S. at 484, *see id.* at 486

(picketing at the home "intrude[s] upon the targeted" captive audience). Indeed, the home is "the one retreat to which men and women can repair to escape from the tribulations of their daily pursuits . . . ." *Carey*, 447 U.S. at 471. *See Gregory v. Chicago*, 394 U.S. 111, 118 (1969) (the home is where people "can escape the hurly-burly of the outside business and political world . . . ."); Landwehr, Unfriendly Persuasion: Enjoining Residential Picketing, 43 Duke L.J. 148 (1993).

As the trial court found, and as shown at the evidentiary hearing, protestors organized by Operation Rescue blockaded Dr. Snydle in his hotel, demonstrated in front of the residences of other clinic staff, and harassed the minor children of clinic staff in their home. J.A. 53-54, 174-79, 490-524. These facts warranted the prohibitions of paragraph six of the injunction.

CONCLUSION

For the reasons stated above, the judgment of the Florida Supreme Court in this case should be affirmed.

Respectfully submitted,

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(14)

No. 93-880

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

JUDY MADSEN, ED MARTIN, and SHIRLEY HOBBS,

Petitioners,

—v.—

WOMEN'S HEALTH CENTER, INC.,
AWARE WOMAN CENTER FOR CHOICE, INC.,
EPOC CLINIC, INC., and CENTRAL FLORIDA
WOMEN'S HEALTH ORGANIZATION, INC.,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

BRIEF OF AMICI CURIAE NOW LEGAL DEFENSE AND EDUCATION FUND, NATIONAL ORGANIZATION FOR WOMEN, INC., JOHN E. COWLES, AND LUCINDA M. FINLEY, IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI CURIAE

Amici Curiae file this brief in support of Respondents. The specific statements of Amici Curiae are set forth in Appendix III.[1]

SUMMARY OF ARGUMENT

The judiciary's equitable power to issue injunctive relief is unique. In circumstances where parties to a proceeding engage in an established pattern of unlawful, even violent, behavior, the court's power to probe the specific facts through an evidentiary hearing and craft a narrowly-tailored, flexible remedy focused on those specific facts is invaluable and necessary in maintaining the rule of law. Because injunctive relief is unique, strict adherence to the standards developed for evaluating statutes or regulations of general applicability is inappropriate. Unlike a statute, an injunction (1) applies only to a small segment of the public; (2) is based on judicial findings of fact made after a hearing as to the particularized need for the restrictions; (3) must give actual notice only to the subjects of the injunction; and (4) by its nature is "permanent" only so long as it is not modified or vacated by the court.

The injunction here properly balances First Amendment considerations with the need to safeguard the rights of both Respondents and third-persons in a context of ongoing illegality and violence at the Respondent clinics, and in the wake of the murder of a clinic doctor in Northern Florida by an affiliate of the same extremist group, Rescue America, involved in the blockades here. As recognized by

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[1] Amici Curiae file this brief with the consent of all parties. Letters of consent have been filed with the Clerk of the Court pursuant to Rule 36.2 of the Rules of this Court.

lower courts across the country confronting such violent and disruptive actions against abortion clinics, the reproductive rights of women, the rights of patients to medical care, the governmental interest in maintaining public safety, and the rights of clinic staff to privacy in their homes, all support the narrowly-tailored balance struck by the trial court in crafting the injunction here.

ARGUMENT

I. MEASURED AGAINST THE STANDARDS GOVERNING INJUNCTIONS DESIGNED TO SAFEGUARD THE RIGHTS OF BOTH RESPONDENTS AND THIRD-PERSONS FROM IRREPARABLE INJURY, THE TRIAL COURT'S INJUNCTION SHOULD BE AFFIRMED

In Schenk v. United States, 249 U.S. 47 (1919), Justice Holmes observed that

> the character of every act depends upon the circumstances in which it is done. The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. It does not even protect a man from an injunction against uttering words that may have all the effect of force. The question in every case is whether the words are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent.

Id. at 52. Though Justice Holmes' "clear and present danger" test has been refined by later case law, see Brandenburg v. Ohio, 395 U.S. 444 (1969), the necessity

of examining injunctions in the context of the specific circumstances has been reiterated again and again. See, e.g., Carroll v. Princess Anne, 393 U.S. 175, 183 (1968) ("whether the facts justify the use of the drastic power of injunction necessarily turns . . . upon a delicate assessment of the particular situation"); American Steel Foundries v. Tri-City Cent. Trades Council, 257 U.S. 189, 198 (1921) ("Each case must turn on its own circumstances"). Further, this Court has never retreated from the principle that incidental restrictions on speech may, under certain circumstances, be necessary to protect the public safety, the rights of others and the rule of law. See, e.g., Wisconsin v. Mitchell, 113 S. Ct. 2194, 2199 (1993) ("potentially expressive activities that produce special harms distinct from their communicative impact are entitled to no constitutional protection"); Brandenburg v. Ohio, 395 U.S. 444 (1969) (inducement to imminent lawless activity not protected by First Amendment). A context of ongoing violence is a particularly compelling circumstance for such judicial regulation. As Justice Frankfurter stated in Milk Wagon Drivers Union, Local 753 v. Meadowmoor Dairies, 312 U.S. 287 (1941), "[an] utterance in the context of violence can lose its significance as an appeal to reason and become part of an instrument of force. Such utterance was not meant to be sheltered by the Constitution." Id. at 293.

Petitioners are individuals closely associated with Operation Rescue America (hereinafter, "Rescue America"), an organization acting in coalition with Operation Rescue, Operation Goliath, and other groups to execute a "nationwide campaign . . . directed towards closing down abortion clinics and providers throughout the country."[2] J.A.6. Petitioners intend to accomplish their

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[2] Although not participating as Petitioners before this Court, Operation (continued...)

objective by mobilizing "thousands of protestors and blocking access to the [medical] facilities." Id.

In pursuing this strategy, members of Rescue America and its sister organizations have repeatedly engaged in violence and demonstrated contempt for law and the rights of others, leading state and federal judges throughout the United States to issue at least 40 reported injunctions and numerous unreported injunctions against their unlawful behavior.[3] Like Respondents here, clinics across the country are frequently besieged by mobs of anti-abortion extremists who block access to clinic doors, sidewalks and parking lots; surround individual patients and health care providers and harass and assault them; push signs and literature in the faces of patients and staff; prevent patients and staff from entering or leaving buildings, even in medical emergencies; scream and chant loudly enough to be audible inside clinics; invade clinic facilities while medical procedures are underway; and chain themselves to clinic property.[4]

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[2] (...continued)
Rescue and Operation Goliath were named as defendants before the lower court and are bound by the injunction at issue here. J.A.56.

[3] All known reported federal and state court injunctions against these groups and similar organizations are cited and briefly summarized in Appendix I hereto. Appendix II summarizes all known unreported injunctions issued by Florida state courts.

[4] See, e.g., Portland Feminist Women's Health Ctr. v. Advocates for Life, 859 F.2d 681, 683 (9th Cir. 1988) (demonstrators impeded entrance to clinic; screamed and yelled at patients; pushed literature on patients who had declined it; impeded passage of an ambulance arriving to transport a patient to a hospital); Planned Parenthood v. Williams, 16 Cal. Rptr.2d 540, 541 (Ct. App. 1993) (demonstrators impeded access to the clinic; confronted patients with literature and plastic fetuses; told patients they were killing their babies; photographed patients and wrote down their license plate numbers).

These actions are part of a national campaign by well-organized anti-abortion zealots who are committed to shutting down clinics in order to eliminate access to abortion.[5] See, e.g., Roe v. Operation Rescue, 919 F.2d 857, 861 (3d Cir. 1990) (blockades constituted "one phase of a well-orchestrated campaign to disrupt and shut down abortion clinics throughout the nation"). Many clinics have been subjected to other types of violence and threats of violence (such as death threats against health care workers). See Feminist Majority Foundation, supra, at 5. Indeed, the trial court here found that Petitioners and those acting in concert with them had engaged in repeated instances of trespass (J.A.53), stalking (J.A.55), threats of physical harm (J.A.54), deliberate jamming of phone lines (J.A.55), obstruction of traffic (J.A.51-52), and other criminal and civil violations (J.A.17). These activities are consistent with Rescue America's practice of urging "their members [to] ignore the law of the State and the police officers who remove them from their blockade positions." J.A.7.

Petitioners challenge the constitutionality of an injunction issued by the trial court on April 8, 1993, in Seminole County, in central Florida, a few weeks after the

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[5] See generally Feminist Majority Foundation, 1993 Clinic Violence Survey Report 2 (16 percent of clinics responding to survey were blockaded during the first seven months of 1993; 15 percent reported that anti-abortion extremists had actually invaded the clinic) (for the Court's convenience, this document has been lodged with the Clerk of the Court); National Abortion Federation, Incidents of Violence & Disruption Against Abortion Providers, 1993 (over 500 incidents of clinic blockades and 32,000 arrests since 1987); National Abortion Rights Action League, Facing A Future Without Choice: A Report on Reproductive Liberty in America 6-8 (1992) [hereinafter, NARAL]; National Clinic Defense Project of the Feminist Majority Foundation, Reported Incidents of Violence and Harassment at Abortion Clinics in Florida (1993) [hereinafter, National Clinic Defense Project].

March 10, 1993, assassination of Dr. David Gunn in Pensacola, Florida. See Larry Rohter, Doctor is Slain During Protests Over Abortions, N.Y. Times, March 11, 1993, A:1(2). Shortly after the killing, the media reported that the suspect, Michael Griffin, was a member of Rescue America and had been at Dr. Gunn's clinic participating in a blockade at the time of the murder. Id.; Paul Gray, Thou Shalt Not Kill, Time, March 22, 1993, at 44 (before the protest, "Griffin had called John Burt, regional director of Rescue America . . . to say he would take part").[6]

The trial court issued the injunction here after a careful adversary hearing lasting three days and after a prior less specific injunction had been repeatedly flouted by defendants below.[7] J.A.50. After hearing evidence on the pattern of blockades and threats, and the climate of fear they intentionally engendered, the trial court banned the organizational and individual defendants, and persons acting in concert with them, from engaging in, inter alia, four forms of threatening activity aimed at clients and employees of the Respondent clinics: (1) congregating, picketing, patrolling, demonstrating or entering a 36 foot buffer zone around the clinic (J.A.57-59), where cars and individuals had been blockaded repeatedly by defendants below and their affiliates in violation of local law and the prior injunction; (2) subjecting individuals seeking the services of the medical facility to unwanted personally-directed proselytizing within a 300 foot radius of the clinic (J.A.59),

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[6] Griffin has been found guilty of premeditated murder. Abortion Foe Gets Life Term in '93 Killing, Chicago Trib., March 6, 1994, C3.

[7] No question has been raised as to the procedural regularity of the hearing leading to the injunction. The trial court complied with the procedural guidelines established by this Court in Carroll v. Princess Anne, 393 U.S. 174 (1968).

where previously such proselytizing had threatened individuals and severely obstructed traffic approaching the clinic; (3) approaching, congregating, picketing, patrolling, demonstrating or using bullhorns or other sound amplification equipment within 300 feet of the residences of clinic personnel (J.A.59-60), in the wake of death threats directed to clinic personnel;[8] and (4) during surgery and recovery periods, singing, chanting, whistling, shouting, yelling, or using bullhorns, auto horns, sound amplification equipment or other sounds or images observable to or within earshot of patients inside the clinic. J.A.59.

Petitioners level several charges at these aspects of the trial court's injunction. First, they claim that the injunction is an illegal prior restraint. Second, Petitioners complain that the injunction is content or viewpoint-based, singling out anti-abortion speech for special regulation, while leaving other speakers free to engage in the activities in question. Third, Petitioners claim that the injunction is unnecessarily broad, banning more speech than necessary to maintain order and preserve the rights of others. Finally, Petitioners argue that the injunction is vague, claiming that it is difficult to know with certainty when unaffiliated anti-abortion demonstrators will be deemed "in concert" with the other defendants below.

None of these objections warrant interference with the trial court's good faith effort to uphold the rule of law when faced with the extreme facts here. Indeed, each of Petitioners' objections to the injunction overlook the critical distinction between a statute or regulation and an injunction.

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[8] For example, on one occasion "[a] doctor was followed as he left the clinic by a person associated with the respondents who communicated his anger to the doctor by pretending to shoot him from the adjoining vehicle." J.A.54.

The former imposes generally applicable speech restrictions on the entire community, while a court order is designed to prevent the continuation of an established pattern of unlawful behavior by specified individuals that threatens the rights of others with irreparable injury. Throughout their initial brief to this Court, Petitioners err by measuring this injunction by standards that have been developed for evaluating statutes rather than injunctions.

This Court has ruled that statutes and regulations seeking to restrict speech must: (1) apply equally to all;[9] (2) be based on a legislative finding of serious social need;[10] and (3) give precise notice of the scope of coverage to all.[11] When, however, as here, Petitioners have engaged in a pattern of lawless behavior that demonstrates contempt for the legal rights of others, courts are empowered to issue injunctions aimed solely at the offending individuals and those acting in concert with them in order to protect the rights of Respondents and third-persons from irreparable injury.[12] Unlike a statute, such an injunction (1) applies

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[9] The requirement of equal applicability is generally phrased as a requirement that content-based or viewpoint-based regulation be subject to strict scrutiny. See Perry Educ. Ass'n v. Perry Local Educs.' Ass'n, 460 U.S. 37, 45 (1983); Carey v. Brown, 447 U.S. 455, 461-62 (1980).

[10] See FCC v. Pacifica Found., 438 U.S. 726 (1978) (special treatment of indecent broadcast permissible in order to limit children's exposure to it); Brandenburg v. Ohio, 395 U.S. 444 (1969) (inducement to imminent lawless activity not protected by First Amendment).

[11] This in known as the "void-for-vagueness" doctrine. See Smith v. Goguen, 415 U.S. 566 (1974); Palmer v. Euclid, 402 U.S. 544 (1971).

[12] See, e.g., National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679, 697 (1978) (having found a Sherman Act violation, trial (continued...)

only to a small segment of the public; (2) is based on judicial findings of fact made after an adversary hearing as to the particularized need for the restrictions; (3) must give actual notice only to the subjects of the injunction; and (4) by its nature is "permanent" only so long as it is not modified or vacated by the court.

The type of injunction at issue in this case, which limits threatening activity at certain times and places in order to safeguard the rights of Respondents and third persons should not be confused with the classic judicial prior restraints at issue in Near v. Minnesota, 283 U.S. 697 (1931), and New York Times v. United States, 403 U.S. 713 (1971). See also Alexander v. United States, 113 S. Ct. 2766, 2771 (1993) (explaining that prior restraints are orders that completely forbid certain communications in

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[12] (...continued)
court was "empowered to fashion appropriate restraints on the [defendant's] future activities both to avoid a recurrence of the violation and to eliminate its consequences"); Local Union No. 10, United Ass'n of Journeymen Plumbers v. Graham, 345 U.S. 192, 201 (1952) (injunction of picketing permissible when purpose of picketing conflicts with state "Right to Work" statute); International Bhd. of Teamsters, Local 309 v. Hanke, 339 U.S. 470 (1949) (sustaining injunction of picketing for sole purpose of compelling employer to adopt a union shop); Building Serv. Employers Local 262 v. Gazzam, 339 U.S. 532, 540-41 (1949) (sustaining injunction of picketing for sole purpose of compelling employer to coerce his employees to join picketing union); Giboney v. Empire Storage & Ice Co., 336 U.S. 490 (1948) (sustaining injunction of picketing carried on for purpose of coercing employer to violate state antitrust law); Carpenters & Joiners Union, Local 213 v. Ritter's Cafe, 315 U.S. 722 (1941) (sustaining injunction of union from picketing cafe having no business connection with place where industrial dispute centered); Milk Wagon Drivers Union, Local 753 v. Meadowmoor Dairies, 312 U.S. 287 (1941) (sustaining injunction when peaceful picketing so enmeshed in background of violence that it was part of a pattern of violence).

advance of the time that they are to occur). When a trial court enjoins future speech in an effort to suppress a substantive message, this Court has properly treated the activity with great hostility. See Vance v. Universal Amusement Co., 445 U.S. 308 (1980) (per curiam); Vincent Blasi, Toward a Theory of Prior Restraint: The Central Linkage, 66 Minn. L. Rev. 11 (1981). But where, as here, an injunction is not aimed at suppressing speech because of its content, but is intended to prevent continuation of a pattern of improper activity that threatens the rights of Respondents, their employees and the public with irreparable injury, this Court has recognized the legitimacy of such judicial regulation. See discussion supra at pp. 8-9 & n.12 (citing cases).

In restricting the time, place and manner of Petitioners' activities, the injunction here focuses not on what they say or advocate, but on what they do at the clinic and at residences of clinic employees.[13] Each of the injunction's provisions is "justified without reference to the content of the regulated speech." City of Renton v. Playtime Theatres, 475 U.S. 41, 48 (1986). See also Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) ("A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others"). Because of their established history of lawlessness and repeated

[13] Perry Educ. Ass'n v. Perry Local Educs.' Ass'n, 460 U.S. 37 (1983), sets out the requirements for evaluating regulatory and statutory restrictions on the time, place and manner of speech. See also United States v. O'Brien, 391 U.S. 367 (1968). However, the proper test for injunctions may have a different focus. For example, this Court has indicated that an injunction, even one that may impinge on speech, "must be judged [by] whether the relief represents a reasonable method of eliminating the consequences of the illegal activity." National Soc'y of Professional Eng'rs, 435 U.S. at 698.

violations of the prior injunction entered by the trial court, Petitioners and those acting in concert with them are enjoined from talking about anything -- including the weather or the Dolphins -- within the time, place and manner restrictions set out in the injunction. A precisely targeted injunction will always be in some sense one-sided because it is not, and should not by its nature be, aimed at the general public.[14] Indeed, if this Court adopted the analysis of the Eleventh Circuit Court of Appeals in Cheffer v. McGregor, Cert. Pet. App. C, i.e., that the injunction at issue here was content-based simply because it applied only to defendants, id. at C-11-12, every injunction that limited its applicability to comply with the dictates of Fed. R. Civ. P. 65 would be a content-based restriction.

It is Petitioners and those acting in concert with them whom the trial court found, after an extensive adversary hearing, were engaged in trespassing, blocking, disrupting, intimidating and threatening conduct directed at the Respondents, their patients and employees. Injunctive relief is properly aimed at this small segment of the general public, whose interests were fully represented before the trial court and whose unlawful pattern of behavior, continuing after a first injunction, cries out for special governmental attention. Cf. United States v. Paradise, 480 U.S. 149 (1987) (approving injunction ordering one-black-for-one-white promotion in light of egregious and continuing discrimination). Indeed, such relief is part and parcel of the judiciary's equitable power to craft an

[14] Petitioners make much of Judge McGregor's observation that the injunction here "did not pertain to those on the other side of the issue." J.A.71; Pet. Br. at 10-11. However, Judge McGregor's statement is not probative of whether the injunction is content-based. Instead, Judge McGregor was simply acknowledging that the nature of an injunction is to regulate only the behavior of a certain group of people.

appropriate remedy to address proven wrongs. As Justice Stevens observed in Hirsh v. City of Atlanta, 495 U.S. 927 (1990) (denial of stay) (Stevens, J., concurring), "[i]t is entirely proper . . . to draw a distinction between injunctive relief imposing time, place, and manner restrictions upon a class of persons who have persistently and repeatedly engaged in unlawful conduct, on the one hand, and an injunction that constitutes a naked prior restraint against a proposed march by a group that did not have a similar history of illegal conduct in the jurisdiction where the march was scheduled." Id. at 927 (citations omitted). See also Chicago Teachers' Union Local No. 1 v. Hudson, 475 U.S. 292, 309 n.22 (1986) ("The judicial remedy for a proven violation of law will often include commands that the law does not impose on the community at large").

Similarly, Petitioners' claim that the prophylactic restrictions imposed by the injunction are too broad when measured by ordinary standards governing statutory restrictions on speech overlooks the fact that the trial court found, after a full adversary hearing, that the restrictions were necessary in the factual context of this case to deal with the climate of terror created by the pattern of lawlessness and threatening behavior, both locally and nationally, indulged in by Petitioners and other defendants below. As this Court noted in evaluating a time, place and manner restriction in Grayned v. City of Rockford, 408 U.S. 104 (1972), "[t]he crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time." Id. at 116. Here, the hearing conducted below allowed for a full evaluation of the specific circumstances. The resulting injunction balancing the competing interests involved here is well within the scope of permissible restrictions upheld by this Court in contexts where the regulations at issue -- statutes and ordinances -- were of

much broader applicability. See, e.g., Burson v. Freeman, 112 S.Ct. 1846 (1992) (upholding clear zone around polling places); Boos v. Barry, 485 U.S. 312 (1988) (upholding ordinance prohibiting congregating within 500 feet of foreign embassy); City of Renton v. Playtime Theatres, 475 U.S. 41 (1986) (upholding prohibition on adult theaters within 1000 feet of residential zones, family dwellings, churches, parks or schools); Cox v. Louisiana, 379 U.S. 536 (1965) (upholding ban on picketing within 100 feet of courthouse). Further, unlike a statute, even a "permanent" injunction may be modified or vacated by the court on its own motion, or on the motion of the parties. See Fla. R. Civ. P. 1.610(d); Fed. R. Civ. P. 65.

Petitioners' concern that it is difficult to identify persons "acting in concert" with Petitioners for the purpose of applying the injunction also misunderstands the order's purpose. Used in the context of a specific injunction, the term "in concert" requires a degree of participation either directly or through knowing assistance in the pattern of unlawful activity engaged in by the Petitioners and other defendants below. The term does not connote mere opposition to abortion, Roe v. Operation Rescue, 919 F.2d 857 (3d Cir. 1990) (nonparty in concert when protestor had knowledge of injunction and actively violated its provisions), and anti-abortion activists not acting in concert with Petitioners have nothing to fear from the injunction. See Regal Knitwear Co. v. NLRB, 324 U.S. 9, 13 (1945) (courts "may not grant an injunction so broad as to make punishable the conduct of persons who act independently and whose rights have not been adjudged according to law"). Thus, the injunction here clearly identifies its targets, providing a clear, narrowly tailored standard to

govern its applicability.[15]

Finally, the injunction's restrictions on loud noise and images visible from the clinic during hours when surgical operations are being conducted are amply supported in the trial court's findings. J.A.54. Similar restrictions of much broader applicability have been routinely permitted around hospitals and other medical facilities in order to protect patients' health and to permit medical facilities to engage in "normal activity." See discussion at Point II.B, infra. Further, ample alternative channels for this type of communication are available when patients arrive at and depart from the clinic, particularly since display of images by Petitioners is not generally restricted within the 300 foot zone and only the extreme amplitude of singing and other noise is regulated. See Cert. Pet. App. at A-19.

The question in this case is not, therefore, whether the injunction would be valid if it were reincarnated as a statute. Rather, it is whether the trial court's factual finding that, in the specific context of this case, Petitioners' past record of contempt for the legal rights of others, including repeated violations of an earlier injunction, when coupled with the climate of fear intentionally created by threats in the wake of Dr. Gunn's murder, justified the

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[15] If municipal authorities nevertheless misconstrue the meaning of "in concert," Petitioners' quarrel is with those authorities rather than with the terms of the injunction. See Cheffer, Cert. Pet. App. C-20-21 (Paine, J., dissenting) (suggesting that pro-life individual not acting "in concert" with Petitioners would be entitled to an order prohibiting enforcement of injunction against her). See also Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100 (1969), rev'd on other grounds, 401 U.S. 321 (1971) (for a non-party to be found to be in active concert or participation with a named, enjoined party, she must have an opportunity to answer the allegation).

prophylactic relief contained in the injunction.[16]

As amici will demonstrate in Point II, on the facts of this case, the clear answer is "yes". The ban on potentially disruptive activity with 36 feet of the clinic was clearly needed to prevent Petitioners from continuing to mass in close proximity to the clinic in an often successful effort to blockade it. The time, place and manner restrictions on loud noises and images were necessary to avoid frightening and aggravating women undergoing sensitive medical treatment within the clinic's doors. The ban on continued unwanted proselytizing within 300 feet of the clinic was clearly needed to ensure the public safety by preventing obstruction of traffic around the clinic and to protect women about to undergo a surgical procedure from unwanted face-to-face confrontations which adversely affected their physical and mental health. The ban on residential picketing within 300 feet of a clinic employee's home was clearly necessary to provide a cordon of safety for individuals who had been threatened in the wake of the assassination of Dr. Gunn. While similar restrictions on communicative activity might not be permissible in all places at all times -- especially if they were imposed by a statute of general applicability -- in the specific context of this time and this place, this injunction provided the minimum response consistent with continued commitment to the rule of law.

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[16] The role of a court under such circumstances is not to issue a statute-like directive of general applicability or to reiterate existing civil and criminal prohibitions. Instead, the judicial branch has a valuable role to play in addressing unique, specific, emergency situations that threaten the rule of law and the public safety. See American Steel Foundries v. Tri-City Cent. Trades Council, 257 U.S. 184, 206 (1921) (volatile, sometimes violent picketing "is a case for the flexible remedial power of a court of equity, which may try one mode of restraint, and, if it fails or proves too drastic, may change it").

II. THE SUBSTANTIAL INTERESTS INFRINGED BY PETITIONERS' ACTIVITIES JUSTIFY THE INJUNCTION ENTERED BELOW

A. The Reproductive Rights Of Women Constitute Significant And Compelling Government Interests

The injunction at issue here meets the tests of either Perry Educ. Ass'n v. Perry Local Educs.' Ass'n, 460 U.S. 37 (1983), or United States v. O'Brien, 391 U.S. 367 (1968), because it is narrowly tailored to serve several significant governmental interests, including the government's interests in protecting women's fundamental right of privacy.[17]

As the Florida Supreme Court recognized, the state interests here include protection of a "woman's freedom to seek lawful medical or counseling services in connection with her pregnancy." Cert. Pet. App. A-15. Women's right to abortion is protected under both the federal and Florida constitutions. In Planned Parenthood v. Casey, 112 S.Ct. 2791 (1992), this Court explained that the right to abortion is essential because "the liberty of the woman is at stake in a sense unique to the human condition and so unique to the law. The mother who carries a child to full term is subject to anxieties, to physical constraints, to pain that only she must bear." Id. at 2807.

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[17] As detailed in Point I, supra, the injunction is content-neutral because although it regulates when, where, and how defendants may speak, it does not regulate what they may say. In practice, there is little if any difference between O'Brien and the time, place and manner test outlined in Perry. See Clark v. Community for Creative Non-Violence, 468 U.S. 288, 298 (1984).

Women's right to reproductive privacy is also strongly protected by Article I, Section 23 of the Florida Constitution: "Unlike the federal constitution, . . . which allows intrusion based on a 'significant' state interest, the Florida Constitution requires a 'compelling' state interest in all cases where the right to privacy is implicated." In re T.W., 551 So.2d 1186, 1195 (Fla. 1989).

Because this state interest is a constitutional one, it is different in character than most state interests supporting restrictions on speech.[18] Here, the injunction is necessary to "ensure that the constitutional rights of one group are not sacrificed in the interest of the constitutional rights of another." New York State Nat'l Org. for Women v. Terry, 704 F. Supp. 1247 (S.D.N.Y.), aff'd as modified, 886 F.2d 1339, 1363 (2d Cir. 1989), cert. denied, 495 U.S. 947 (1990); see Pro-Choice Network v. Project Rescue, 799 F. Supp. 1417, 1433 (W.D.N.Y. 1992). When competing constitutional interests are at stake, this Court is more likely to uphold speech restrictions. Significantly, Burson v. Freeman, 112 S. Ct. 1846 (1992), even upheld a content-based restriction, balancing the right to free speech against the right to vote to uphold a ban on all political speech within 100 feet of a polling place.[19] Id. at 1858.

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[18] Petitioners' contention that "speech related to abortion is political speech," Pet. Br. at 15, is not supported by citation to any authority. Moreover, their quotation from City of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789 (1984), is misleading. In the quotation "An assertion that . . . abortion is Murder, that every woman has the 'Right to Choose' . . . is just as strong as [political speech]," Petitioners omit in the second ellipsis the qualifying language "may have a claim" that such speech is comparable to political speech. Taxpayers for Vincent, 466 U.S. at 816 (emphasis added).

[19] Although the right to vote is arguably given more protection than

(continued...)

Declaring that the question of whether the boundary could be "somewhat tighter" was not a "question of constitutional dimension," the Burson Court noted that it "takes approximately 15 seconds to walk 75 feet." Id. at 1857. In contrast, here the zones around the clinic and residences are based on detailed facts adduced at a hearing. The 36 foot buffer zone around the clinic is approximately one-third of the zone in Burson; the 300 foot anti-harassment zone around the clinic and buffer zone around the residences, although larger, is not significantly so. If it takes 15 seconds to walk 75 feet, it takes only 60 seconds to walk 300 feet, a distance that is even less significant in view of the fact that the principal access to the clinic is by car. J.A.51.

The only case Petitioners offer to argue that the First Amendment is primary in this context is Mississippi Women's Medical Clinic v. McMillan, 866 F.2d 788 (5th Cir. 1989), which is inapposite because women's right to choose abortion was not directly at issue there. Instead, in McMillan the asserted interests were "the privacy interests of women who seek to have abortions . . . while being insulated from the protestors advocacy," 866 F.2d at 795

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[19] (...continued)
the right to abortion, Reynolds v. Sims, 377 U.S. 533, 555 (1964) (voting is the "essence of a democratic society"), the restriction in Burson was undeniably greater than the restrictions here. Not only was the restriction in Burson content-based but it was contained in a statute and thus, unlike this injunction, not tailored to particular circumstances or subject to modification. Moreover, the statute in Burson was upheld despite the fact that it was based on only a "potential" problem. 112 S.Ct. at 1857. Because the law had been enacted so long ago, there was no evidence in the record that a 100-foot boundary was actually needed. Finally, it is worth noting in this regard that neither the right to vote nor the right to abortion are explicitly protected by the Constitution.

(emphasis added), more akin to a "right to be let alone." The plaintiffs in McMillan did not seek an injunction prohibiting blockading or trespassing, but instead sought only an injunction prohibiting picketing within 500 feet of the clinic. Here, the sections of the injunction that Petitioners challenge are necessary concomitants to ensure that Sections (1) and (2) which forbid, inter alia, trespassing and blockading, have real force. Sections (3) through (9) of the injunction are necessary precisely because Sections (1) and (2) are necessary.

Petitioners are also mistaken in asserting, Pet. Br. at 16, that Casey provides support for their arguments that the injunction is unduly restrictive. The plurality was careful to specify that the state regulations upheld in Casey did not have as their purpose to place "a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." 112 S. Ct. at 2820. In fact, the plurality cautioned that a state regulation that had such a purpose or effect would be invalid "because the means chosen by the State to further the interest in potential life must be calculated to inform the woman's free choice, not hinder it." Id. Thus, the informed consent regulations upheld in Casey would be unconstitutional if the State had instituted them for the purpose of delay rather than to "insure an informed choice." Id. at 2824.

Here, as in the cases described in the Appendices hereto, Petitioners' goal is to close down medical clinics, thereby depriving women of their right to choose abortion. In fact, one of the Petitioners, Ed Martin, has stated that he intends to prevent women from obtaining abortions by closing all abortion clinics in the Central Florida area. Cert. Pet. App. A-2-4. In that connection, Martin issued a press release which states that "the spirit of Wichita comes to Florida." J.A.6-7. In Wichita, of course, Operation

Rescue "succeeded in its avowed intent to shut [the clinics] down." Women's Health Care Servs. v. Operation Rescue, 773 F. Supp. 258, 262 (D. Kan. 1991), app. pending, No. 91-3250 (10th Cir. Oct. 11, 1991). See also New York State Nat'l Org. for Women v. Terry, 704 F. Supp. 1247, 1261-62 (S.D.N.Y.), aff'd as modified, 886 F.2d 1339 (2d Cir. 1989), cert. denied, 495 U.S. 947 (1990) ("defendants' activities have the intended effect of shutting down clinics, which in turn causes delay or an absolute loss of a woman's ability to obtain an abortion").

B. The Safety And Health Interests Of Patients Are Legitimate Bases For The Injunction's Restrictions On Blockades, Harassment And Related Activities Near Respondent Clinics

Blockades and related activities have a profound and damaging impact on clinic patients. Not only are women prevented or deterred from exercising their right to choose abortion, see Point II.A., supra, but their health and safety are jeopardized. The trial court below found, that "as a result of . . . having to run such a gauntlet," clinic patients manifested a higher level of anxiety, hypertension and stress, increasing the risk of surgical procedures and inhibiting recuperation. In addition, some patients turned away to avoid the crowd, delaying their procedures and thereby increasing their risk. Cert. Pet. App. B-4-5. Courts have made similar findings in other cases.[20]

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[20] E.g., Portland Feminist Women's Health Ctr. v. Advocates for Life, 859 F.2d at 683, 686 (finding that defendants' conduct impeded provision of medical care, raised risk of medical complications and injury, and blocked ambulance personnel in an emergency); Pro-Choice Network v. Project Rescue, 799 F. Supp. at 1427 (increased stress and anxiety caused by protests outside clinics can cause elevated blood pressure, hyperventilation and other health risks).

Moreover, many clinics also provide a wide range of other health services. Feminist Majority Foundation, supra, at 5-7. Because of clinic blockades, women have been denied prompt access to necessary health care for conditions as diverse as miscarriage of a wanted pregnancy, toxemia, HIV infection, and cancer. Id.; NARAL, supra, at 6-7. See Bering v. SHARE, 721 P.2d 918, 923 (Wash. 1986), cert. dismissed, 479 U.S. 1050 (1987).

Faced with evidence of these dangerous and disruptive tactics, numerous courts have enjoined anti-abortion forces from engaging in activities such as obstructing ingress and egress from clinics, making noise at high volumes, and approaching patients and staff in the clinic vicinity.[21] Many of these injunctions closely resemble provisions of the injunction being challenged in the current case.

Assuming that the correct standard for assessing the constitutionality of such injunctions is the test for reasonable time, place and manner restrictions, the injunction in this case easily passes muster.[22] See, e.g., Perry Educ. Ass'n v. Perry Legal Educs.' Ass'n, 460 U.S. 37 (1983). The injunction makes no reference to the content of the restricted communications and is therefore content-neutral. See Terry, 886 F.2d at 1363. Significant government interests, including the interest in safeguarding patients' health and safety, are at stake. See Northeast Women's Ctr. v. McMonagle, 939 F.2d 57, 63-64 (3d Cir. 1991) (patient safety is a legitimate government interest); Portland Feminist Women's Health Ctr., 859 F.2d at 686

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[21] See cases described in Appendices I and II hereto.

[22] As discussed at Point I, supra, a different focus may be appropriate when injunctions, as opposed to statutes, are being evaluated. See Nat'l Soc'y of Professional Eng'rs, 435 U.S. at 697 (1978).

(injunction advances significant government interest in preventing interference that may endanger the health and safety of patients). Ample alternative channels of communication exist for the Petitioners to convey their message. Cert. Pet. App. A-19. Further, the restrictions are narrowly tailored, for the reasons discussed below.

In evaluating the reasonableness of the restrictions imposed by the injunction, it is essential to consider the factual circumstances in the present case, including the history of past anti-abortion conduct, the unique functions of a medical facility, and the need to protect patient health and safety. See Northeast Women's Ctr., 939 F.2d at 64. The record in this case is replete with evidence of disruptive, threatening and violent behavior by anti-abortion forces at the Respondent clinics. Cert. Pet. App. B-1-5. Moreover, because the nature of the institution being protected dictates what constitutes a reasonable time, place and manner restriction, Grayned, 408 U.S. at 116, a medical facility that provides abortions is entitled, by virtue of the fact that it performs surgery, to protections against noise and disruption. Pro-Choice Network, 799 F. Supp. at 1433. See Medlin v. Palmer, 874 F.2d 1085, 1090 (5th Cir. 1989). As Justice Blackmun explained in indicating that an adverse effect on patient well-being can support a prohibition on union solicitation at a medical facility,

> [h]ospitals, after all, are not factories or mines or assembly plants. They are hospitals, where human ailments are treated, where patients and relatives alike are under emotional strain and worry, where pleasing and comforting patients are principal facets of the day's activity, and where the patient and his family . . . need a restful, uncluttered, relaxing, and helpful atmosphere.

Beth Israel Hospital v. NLRB, 437 U.S. 483, 507-8 (1978).

In addition, patients seeking to enter an abortion clinic are in a unique circumstance: they are a captive audience, unable to avoid exposure to unwanted and intrusive contacts from those occupying the area through which they must pass to gain entrance to that clinic. See generally Cert. Pet. App. A-17-18; Pro-Choice Network, 799 F. Supp. at 1435; Note, Too Close for Comfort, 101 Harv. L. Rev. 1856, 1864 (1988). As the trial court noted, these contacts pose a direct, serious threat to the patients' health. J.A.54.

A narrower set of restrictions on anti-abortion behavior in the vicinity of the Respondent clinics would not adequately serve the government interests at stake. Here, there were numerous violations of the earlier, narrower injunction, proving the necessity of a broader injunction. J.A.50-51. Anti-abortion picketing in the immediate vicinity of a clinic frequently degenerates into physical obstruction and harassment of patients and clinic staff, and other illegal and dangerous behavior. This is partly due to the fact that the sheer number of demonstrators prevents free ingress to and egress from the clinic, and is partly due to the fact that groups and individuals committed to shutting down abortion clinics are typically willing to employ a broad array of tactics, both legal and illegal. See, e.g., Women's Health Care Servs. v. Operation Rescue, 773 F. Supp. at 262 (describing tortious and criminal actions deliberately undertaken by defendants); Roe v. Operation Rescue, 710 F. Supp. at 588 (finding defendants willing to commit illegal acts repeatedly).

Even if the behavior of anti-abortion protesters could be limited to picketing and speech as traditionally defined, it is still reasonable to restrict the time, place and manner of that activity. Heffron v. International Soc'y for Krishna

Consciousness, 452 U.S. 640 (1981). Close proximity to hostile speakers is inherently extremely stressful. See Note, supra, at 1864-66. While the impact on the listener is not ordinarily a sufficient reason to restrict speech, Cohen v. California, 403 U.S. 15, 21 (1971), the situation of patients about to undergo surgery is unique. For such patients, stress is not merely unpleasant -- it is a serious health threat. Note, supra, at 1864-66. Thus, a restriction that is narrowly tailored to serve the government interest in patient health and safety must go beyond merely prohibiting illegal activity such as physical obstruction and assault in the vicinity of clinics; it must also prohibit unwanted contact and communication with patients as they approach or leave the clinic.

C. The Safety Of The General Public Is A Significant Government Interest Justifying The Injunction

The injunction at issue here was necessary to maintain public safety and the perception of public safety.[23] Cert. Pet. App. A-15. This Court has held that "a group of demonstrators could not insist upon the right to cordon off a street, or entrance to a public or private building, and allow no one to pass who did not agree to listen to their exhortations." Cox v. Louisiana, 379 U.S. 536, 554-55

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[23] Although Petitioners claim that the government interest in public safety and order is well protected by existing laws, Pet. Br. at 17, that assertion is ludicrous in light of the fact that even the first injunction was found to be insufficient to protect public order. Petitioners' citation to Texas v. Johnson in this regard is inapposite. This Court noted in Johnson, 491 U.S. 397, 410-12 (1989), that Texas's asserted interests in its flag desecration law were already served by other laws such as laws prohibiting breaches of the peace, trespass, disorderly conduct, and arson. However, Johnson involved a statute, not an injunction. To accept Petitioners' argument here would lead to the absurd conclusion that an injunction could never restrain conduct that is already unlawful.

(1965). Similarly, in Heffron this Court upheld a rule that impinged on religious practices at a state fair because the rule was necessary for the "demands of safety." 452 U.S. at 651. Here, the governmental interest in safety is of a different order of magnitude. The state interests here -- preventing lawless violence, maintaining the rule of law, and ensuring safe flow of traffic off of a highway exit -- are much greater than the interests in "avoiding congestion and maintaining the orderly movement of fair patrons," 452 U.S. at 652, found to be substantial in Heffron. See also Terry, 886 F.2d at 1364 (noting "significant governmental interests in maintaining public safety").

D. The Safety And Privacy Interests Of Health Care Providers Are Legitimate Bases For The Injunction's Restriction On Residential Picketing And Related Activities

Individual health care providers are also the targets of widespread violence and harassment by anti-abortion extremists throughout the country, including in Florida. Among clinics responding to a recent national survey, 21 percent reported that clinic staff had received death threats during the first seven months of 1993, and 15 percent reported that clinic personnel had been stalked. Feminist Majority Foundation, supra, at 2. Another survey, covering the first three and a half months of 1993, recorded 90 incidents of stalking, which was defined as persistent following, threatening, and harassing of an abortion provider, staff member or patient away from the clinic. National Abortion Federation, supra.

Threats, harassment, and intimidation directed at health care personnel are part of a broad campaign of anti-abortion violence, which includes bombings, arson, vandalism, blockades, invasions and chemical attacks against facilities

that perform abortions. See generally Feminist Majority Foundation, supra; National Abortion Federation, supra. In the ultimate evidence of the danger that anti-abortion fanatics pose to individual health care providers, two physicians have been shot, one fatally, during the past year. See Abortion Foe Who Shot A Doctor Is Convicted Of Attempted Murder, N.Y. Times, March 26, 1994, at A7 (describing conviction of Rachelle Shannon for attempted murder of Dr. George Tiller, on Aug. 19, 1993, in Wichita, Kansas); Larry Rohter, Doctor is Slain During Protests Over Abortions, N.Y. Times, March 11, 1993, at A1 (describing murder of Dr. Gunn in Pensacola, Florida, on March 10, 1993).

Clinic owners, physicians, and employees are particularly vulnerable to anti-abortion violence when they are outside the clinic building. Throughout the country, clinic staff and their families have been stalked as they travel to their work, homes, churches, malls, and grocery stores. Feminist Majority Foundation, supra, at 3. Such settings may lack the sophisticated security precautions that now characterize many abortion clinics. See Feminist Majority Foundation, supra, at 4 (describing clinic security). As a result, anti-abortion activity at a health care provider's home may pose a greater risk to the provider's safety than similar activity at the clinic itself.

Reported incidents of anti-abortion activity directed at clinic doctors and employees in their homes include the following: three rounds of gunfire shot through the front window of a physician's home while he and his family were there, Feminist Majority Foundation, supra, at 3; clinic staff receiving threatening mail at home, National Clinic Defense Project, supra, at 7; a doctor blockaded in his home by a crowd of individuals and vehicles that converged on his yard and driveway. Id. at 2. In one case the tactics

of anti-abortion protestors included "groups as large as 30 demonstrat[ing] at the gate of [the doctor's] home, congregating in pre-dawn hours, shouting and honking car horns, and attempting to block the departure of the doctor and her family members," vandalizing the doctor's house and garage, and stalking the doctor and her family. Fargo v. Women's Health Org., 488 N.W.2d 401, 405 (N.D. 1992), aff'd on appeal after remand, 502 N.W.2d 536 (N.D. 1993).[24]

The record in the present case demonstrates that clinic personnel have been subjected to a pattern of threats and harassment at their homes and elsewhere. Protestors have approached the private residences or temporary lodging places of clinic employees on multiple occasions, communicating directly with the occupants (including minor children at home alone), picketing, shouting at passers-by, ringing doorbells of neighbors, and providing literature identifying the clinic employee as a "baby killer." J.A.53. Further, a staff physician attempting to enter the clinic parking lot was forced to stop his vehicle and remain stopped while demonstrators yelled and screamed "Baby killer" and "We don't want you here in Melbourne" at him, J.A.54; a staff physician was temporarily prevented from leaving a motel where he was staying while protestors

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[24] See also Northeast Women's Ctr., 939 F.2d at 60, 66 (defendants blocked doctor's driveway and prevented his leaving for work for a period of time; demonstrations frightened clinic employees' children at their homes); Klebanoff v. McMonagle, 552 A.2d 677, 679-80 (Pa. Super. Ct. 1988), app. denied, 563 A.2d 888 (Pa. 1989) ("devastating effect" of repeated demonstrations created "general chaos" for doctor's family and their neighbors); Kaplan v. Prolife Action League, 431 S.E.2d 828, 830-31 (N.C. Ct. App. 1993) (at least twelve instances of picketing at home of doctor and family, including threatening conduct), rev. denied, 436 S.E.2d 379 (N.C. 1993), pet. for cert. filed, 62 U.S.L.W. 3511 (U.S. Jan. 18, 1994) (No. 93-1159).

entered the motel lobby yelling "child murderer" and "baby killer," J.A.53-54; staff have been followed in a stalking manner when they leave the clinic, J.A.55; and a doctor was followed from the clinic by someone who pretended to shoot him. J.A.54.

In addition to the terror, injury, and even death inflicted on individual clinic personnel, the violence and harassment directed at clinic owners, doctors and employees has contributed to the lack of availability of abortion in the United States. Only 17 percent of counties in this country have one or more provider of legal abortions. Stanley K. Henshaw and Jennifer van Vort, Abortion Services in the United States, 1987 and 1988, 22 Fam. Planning Perspectives 102, 106-7 (May/June 1990). Almost one-fourth of clinics responding to a national survey reported that a staff member had quit as a result of anti-abortion incidents; and one-half of the clinics that experienced a staff member's resignation had difficulty finding a replacement. Feminist Majority Foundation, supra, at 5. In this case, the trial court below found that a physician terminated his clinic employment because of anti-abortion demonstrations and activities. Cert. Pet. App. B-5. See also Northeast Women's Ctr., 939 F.2d at 66 (harassment of clinic employees at their homes partly responsible for two employees' resignations). In response to this nationwide campaign of terror, numerous courts, including the court below, have entered injunctions designed to restrict picketing and related activity at or near clinic employees' homes. See, e.g., Dayton Women's Health Ctr. v. Enix, 589 N.E.2d 121, 127 (Ohio Ct. App. 1991), cert. denied, 112 S. Ct. 3033 (1992); Welsh v. Johnson, 508 N.W.2d 212 (Minn. Ct. App. 1993).

To determine the constitutionality of such injunctions, this Court's decision in Frisby v. Schultz, 487 U.S. 474

(1988), provides useful guidance. Under that decision, restrictions on residential picketing are permissible if they "'are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.'" Id. at 481 (quoting Perry, 460 U.S. at 45).

The limits on residential picketing and related activity that were established by the trial court below meet all these criteria. For the reasons described above, the injunction is not content-based. See discussion, Point I, supra. The lower court's injunction is also narrowly tailored to serve significant government interests, including both the government interest in "protecting the well-being, tranquility and privacy of the home," as recognized in Frisby, 487 U.S. at 484-85, and the government interest in safeguarding the physical safety of health care providers, which is seriously threatened by anti-abortion extremists' activities. Finally, for the reasons explained by the Supreme Court of Florida in its opinion below, the injunction leaves open ample alternative means of communication. Cert. Pet. App. at A-19.

Applying the Frisby test, the U.S. Court of Appeals for the Third Circuit correctly found that a residential picketing injunction virtually identical to Paragraph 6 of the injunction in the current case was permissible. Northeast Women's Ctr., 939 F.2d at 65-67. Similarly, in Kaplan v. Prolife Action League, 431 S.E. 828, 841-49 (1993), an injunction prohibiting "picketing, parading, marching, or demonstrating anywhere within 300 feet of the center line" of the street where the affected doctor lived was upheld under the Frisby standard. See also Murray v. Lawson, 624 A.2d 3 (N.J. Super. Ct. App. Div.), cert. granted, 627 A.2d 1149 (N.J. 1993) (upholding injunction forbidding picketing within 300 feet of doctor's residence).

It should be noted that Frisby v. Schultz involved a challenge to residential picketing legislation.[25] By contrast, in the present case, "we are dealing with a remedial injunction and not an ordinance of general application." Northeast Women's Ctr., 939 F.2d at 67. An injunction such as the one at issue here may be permissible even if an identical statute would not pass constitutional muster, because factors such as "narrowly tailored" and "significant government interest" must be evaluated in light of the specific circumstances that gave rise to the injunction. The trial court properly evaluated and balanced such factors in entering the injunction here.

CONCLUSION

For the foregoing reasons, the decision of the Florida Supreme Court should be affirmed.

Respectfully submitted,

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[25] Such legislation is not uncommon. See, e.g., Garcia v. Gray, 507 F.2d 539 (10th Cir. 1974), cert. denied, 421 U.S. 971 (1975) (upholding local picketing ordinance); Town of Barrington v. Blake, 586 A.2d 1015 (R.I. 1990) (upholding local picketing ordinance).

APPENDIX I

APPENDIX I(A):

Reported Federal Cases Issuing or Upholding Similar Injunctions*

Aradia Women's Health Ctr. v. Operation Rescue, No. C88-1539R (W.D. Wash. Jan 10, 1989), aff'd, 929 F.2d 530 (9th Cir. 1991) (enjoining defendants from blocking any ingress to or egress from the facility; congregating or standing within a 25 foot corridor extending from the clinic to the sidewalk; physically harassing anyone entering or exiting the facility; making any noise that substantially interferes with the provision of medical services)

Cousins v. Terry, 721 F. Supp. 426 (N.D.N.Y. 1989) (enjoining defendants and those in concert from obstructing ingress or egress from any facility in county at which abortions are performed; physically abusing or tortiously harassing anyone entering, leaving, working at, or using any clinic services; permitting non-threatening sidewalk counseling by not more than two people for every person they are seeking to counsel, provided person does not object)

National Org. for Women v. Operation Rescue, 726 F. Supp. 1483 (E.D. Va. 1989), aff'd, 914 F.2d 582 (4th Cir. 1990), rev'd in part, vacated in part and remanded sub nom. Bray v. Alexandria Women's Health Clinic, 113 S.Ct. 753 (enjoining defendants and those in concert from trespassing, blockading, impeding or obstructing access to or egress from the facility)

New York State Nat'l Org. for Women v. Terry, 697 F. Supp. 1324 (S.D.N.Y. 1988) and 704 F. Supp. 1247 (S.D.N.Y.), appeals consolidated and aff'd as modified,

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* Cases are listed in alphabetical order.

886 F.2d 1339 (2d Cir. 1989), cert. denied, 495 U.S. 947 (1990) (enjoining defendants and those in concert from trespassing or blocking ingress or egress from clinics; physically abusing or tortiously harassing persons entering or leaving clinics; permitting nonthreatening sidewalk counselling done by no more than two people with each person sought to be counseled, provided person does not object)

Northeast Women's Ctr. v. McMonagle, 745 F. Supp. 1082 (E.D. Pa.), modified, 749 F. Supp. 695 (E.D. Pa. 1990), aff'd in part, remanded in part, 939 F.2d 57 (3d Cir. 1991) (enjoining defendants from blocking clinic entrance; singing, chanting, or using sound amplification audible to patients inside the clinic, or displaying images visible to patients during times of surgical procedures and recovery periods; having an information table closer than 500 feet from the property line of the clinic during times of surgical procedures and recovery periods, except that there may be one table in a specified place, staffed by only two people, with one sign; picketing within 500 feet of the property line, except that 6 people may picket peacefully in a designated spot at all times)

NOW v. Operation Rescue, 726 F. Supp. 300 (D.D.C. 1989), perm. injunction granted, 747 F. Supp. 760 (D.D.C. 1990), appeal pending, Nos. 91-7001, 91-7006 (D.C. Cir.), modifying injunction, 816 F. Supp. 729 (D.D.C. 1993) (enjoining defendants and those in concert from trespassing on, blockading, impeding or obstructing access to or egress from clinic, and directing others to do so)

New York v. Operation Rescue-National, Civ. 92-4884 (S.D.N.Y July 13, 1992), aff'd sub nom. United States v. Terry, 802 F. Supp. 1094 (S.D.N.Y. 1993) (enjoining defendants and those in concert from demonstrating within

15 feet of door, or 15 feet within any person entering or leaving clinic, except that non-threatening sidewalk counseling is allowed by no more than two people per person they want to counsel; physically abusing, or harassing any person entering or leaving; making noise that endangers the health or safety of patients)

Planned Parenthood Ass'n v. Holy Angels Catholic Church, 765 F. Supp. 617 (N.D. Cal. 1991) (enjoining defendants and those in concert from blocking ingress to or egress from clinic or parking area; demonstrating, picketing, distributing literature, or counseling within 25 feet of entrance; approaching any person once such person has stated that s/he does not wish to be approached; shouting, chanting, or otherwise producing loud noises which can be heard within clinic; touching, threatening or shouting at person entering or leaving clinic)

Portland Feminist Women's Health Ctr. v. Advocates for Life, 712 F. Supp. 165 (D. Or.), aff'd as modified, 859 F.2d 681 (9th Cir. 1988) (affirming injunction enjoining defendants and those in concert from yelling, shouting, chanting, or making any noise that substantially interferes with the provision of medical services; obstructing access, demonstrating or handing out literature within the "free zone" of 12 1/2 feet of clinic)

Pro-Choice Network v. Project Rescue, 799 F. Supp. 1417 (W.D.N.Y. 1992), motion to vacate denied, 828 F. Supp. 1018 (W.D.N.Y.), appeal dismissed, 994 F.2d 989 (2d Cir. 1993) (enjoining defendants and those in concert from demonstrating within 15 feet of building; demonstrating within 15 feet of any person entering or leaving building, except for non-threatening sidewalk counseling done by no more than two people for every person they want to counsel, provided person does not object; physically

abusing anyone entering or leaving; using loudspeakers to disturb patients or staff within the clinic)

Roe v. Operation Rescue, 710 F. Supp. 577 (E.D. Pa. 1989), aff'd, 919 F.2d 857 (3d Cir.), cert. denied sub nom. Brown v. Elizabeth Blackwell Health Ctr., 498 U.S. 958 (1990) (enjoining defendants and those in concert from blocking ingress or egress from clinics, and physically abusing or tortiously harassing anyone entering or leaving the facilities; permitting sidewalk counseling of a reasonably quiet nature by not more than two people for every person they are seeking to counsel, provided person does not object)

Southwestern Medical Clinics v. Operation Rescue, 744 F. Supp. 230 (D. Nev. 1989) (enjoining defendants from trespassing on, blocking, obstructing ingress or egress from clinics; physically abusing or tortiously harassing persons entering or leaving clinics)

Town of West Hartford v. Operation Rescue, 792 F. Supp. 161 (D.Conn. 1992), vacated and remanded, 991 F.2d 1039 (2d Cir.), cert. denied sub. nom. Syversen v. Summit Women's Ctr. West, 114 S.Ct. 185 (1993) (enjoining defendants and those in concert from entering or remaining on the property; physically blocking, obstructing, or otherwise impeding access to clinic)

Wisconsin v. Missionaries to the Preborn, 796 F. Supp. 389 (E.D. Wisc. 1992) (enjoining defendants and those in concert from impeding access to clinic and parking lots; demonstrating within 25 feet of any door, driveway, parking lot entrance or exit, or any person entering or leaving the facility; physically abusing anyone entering or leaving; permitting non-threatening sidewalk counseling by two people per individual or group sought to be counseled

provided person does not object)

Women's Health Care Servs. v. Operation Rescue, 773 F. Supp. 258 (D. Kan. 1991), appeal pending, No. 91-3250 (10th Cir. Oct. 11, 1991) (enjoining defendants and those in concert from blocking entrances and exits to clinic)

APPENDIX I(B):

Reported State Cases Issuing or Upholding Similar Injunctions*

Bering v. SHARE, 721 P.2d 918 (Wash. 1986), cert. dismissed, 479 U.S. 1050 (1987) (affirming injunction enjoining defendants from picketing directly in front of a medical clinic; threatening anyone going in or out of the clinic)

Boffard v. Barnes, 591 A.2d 699 (N.J. Super. Ct. Ch. Div. 1991), aff'd in part, modified in part, 624 A.2d 1 (N.J. Super. Ct. App. Div.), cert. granted, 627 A.2d 1150 (N.J. 1993) (enjoining defendants and those in concert from picketing in immediate vicinity of doctor's residence)

Dayton Women's Health Ctr. v. Enix, 589 N.E.2d 121 (Ohio Ct. App. 1991), cert. denied, 112 S.Ct. 3033 (1992) (enjoining defendant class from blocking access to clinic or picketing within view of the clinic in groups larger than ten; restricting targeted picketing of employee's residence)

Downtown Women's Ctr. v. Advocates for Life, 826 P.2d 637 (Or. Ct. App. 1992) (affirming finding of contempt based on injunction enjoining defendants from harassing, intimidating, or obstructing people entering the clinic)

Ex Parte Tucci, 859 S.W.2d 1 (Tex. 1993) (leaving intact part of an injunction enjoining defendants from blocking entrance to and exit from the clinic; demonstrating within 25 feet of any person entering or exiting; physically abusing or harassing anyone entering or exiting; making any noise

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* Cases are listed in alphabetical order.

that interferes with the clinic or endangers health or safety of patients and staff)

Fairfield Commons Condominium Ass'n v. Stasa, 506 N.E.2d 237 (Ohio Ct. App. 1985), cert. denied sub nom. Moriarity v. Fairfield Commons Condominium Ass'n, 479 U.S. 1055 (1987) (affirming injunction enjoining defendants from picketing or other activities in the vicintiy of the residence of doctor)

Fargo Women's Health Org. v. Lambs of Christ, 488 N.W.2d 401 (N.D. 1992), aff'd on appeal after remand, 502 N.W.2d 536 (N.D. 1993) (affirming part of injunction enjoining defendants from making any noise that substantially interferes with the provision of medical services; going within 100 feet of the property line of the facility when it is open, except that two people may peacefully picket; following, harassing, and intimidating the staff and patients)

Feminist Women's Health Ctr. v. Blythe, 22 Cal. Rptr.2d 184 (Ct. App. 1993), petition for cert. filed, 62 U.S.L.W. 3556 (U.S. Feb. 8, 1994) (No. 93-1279) (affirming injunction enjoining defendants from conducting any activity in a designated "speech free zone" in front of building; making any noise that interferes with the clinic)

Hirsh v. City of Atlanta, 401 S.E.2d 530 (Ga.), cert. denied, 112 S.Ct. 75 (1991) (affirming injunction enjoining defendants and those in concert from conducting a demonstration of more than 20 people within 50 feet of any clinic or parking lot; approaching patients closer than 5 feet, unless that person consents; impeding access to clinic or parking lot)

Horizon Health Ctr. v. Felicissimo, 622 A.2d 891 (N.J.

Super. Ct. App. Div.), cert. granted, 634 A.2d 527 (N.J. 1993) (affirming injunction enjoining defendants and those in concert from trespassing; gathering in a way that harasses the staff and patients; using obscene or abusive language directed at employees or patients; shouting abusive statements; blocking ingress or egress; demonstrating limited to location across the street from the clinic)

Kaplan v. Prolife Action League, 431 S.E.2d 828 (N.C. Ct. App.), rev. denied, 436 S.E.2d 379 (N.C. 1993), petition for cert. filed, 62 U.S.L.W. 3511 (U.S. Jan. 18, 1994) (No. 93-1159) (affirming injunction enjoining defendants from picketing anywhere on doctor's street, or 300 feet from the center line of that street, and threatening or confronting plaintiffs at home or elsewhere)

Klebanoff v. McMonagle, 552 A.2d 677 (Pa. Super. Ct. 1988), appeal denied, 563 A.2d 888 (Pa. 1989) (affirming permanent injunction enjoining defendants from picketing or demonstrating in the street directly in front of the home of doctor)

Lovejoy Specialty Hosp. v. Advocates for Life, 802 P.2d 684 (Or. Ct. App. 1990) (affirming civil contempt order based on injunction enjoining defendants from demonstrating in a "clear area" in front of the hospital; blocking entrance to and exit from the hospital; intimidating and/or harassing employees and patients; making noise that substantially interferes with the operation of the hospital)

Murray v. Lawson, 624 A.2d 3 (N.J. Super. Ct. App. Div.), cert. granted, 627 A.2d 1149 (N.J. 1993) (affirming lower court permanent injunction enjoining defendant and those in concert from picketing within 300 feet of the doctor's residence)

Parkmed Co. v. Pro-life Counselling, 457 N.Y.S.2d 27 (App. Div. 1st Dep't 1982) (enjoining defendants from blocking the entrance to the clinic; interfering with normal clinic operation; physically abusing and harassing people entering or exiting)

Planned Parenthood League v. Operation Rescue, 550 N.E.2d 1361 (Mass. 1990) (enjoining defendants and those in concert from obstructing access to clinic or committng acts of violence against those entering and leaving)

Planned Parenthood v. Cannizzaro, 499 A.2d 535 (N.J. Super. Ct. Ch. Div. 1985), aff'd, 526 A.2d 741 (N.J. Super. Ct. App. Div. 1987) (enjoining defendants and those in concert from intimidating or harassing anyone entering or exiting; shouting loud statements; obstructing vehicular or pedestrian access)

Planned Parenthood v. Maki, 478 N.W.2d 637 (Iowa 1991) (affirming permanent injunction against defendant enjoining her from blocking access to clinic)

Planned Parenthood v. Project Jericho, 556 N.E.2d 157 (Ohio 1990) (affirming injunction enjoining defendants and those in concert from screaming or chanting with the intent to reach patients inside the clinic; screaming at any patient entering or leaving the clinic; mass picketing)

Planned Parenthood v. Williams, 16 Cal. Rptr. 2d 540 (Ct. App.), review granted, 19 Cal. Rptr.2d 492 (1993) (affirming part of injunction enjoining defendants from blocking any entrance to the clinic; picketing in front of the clinic; making any noise that can be heard inside the clinic)

Planned Parenthood v. Wilson, 282 Cal. Rptr. 2d 760 (Ct. App.), vacated, 285 Cal. Rptr. 278, reinstated and aff'd,

286 Cal. Rptr. 427 (Ct. App. 1991) (affirming injunction enjoining defendants from hindering access to the clinic or parking lot; making any noise that substantially interferes with the provision of health care services; harassing any patients or employees)

Powell v. Ward, 425 S.E.2d 539 (Va. Ct. App. 1993) (holding that evidence supported the finding that defendants violated an injunction enjoining defendants and those in concert from blocking the entrance to the clinic; physically abusing or tortiously harassing anyone entering or exiting, but reversing and remanding because particular defendants were not acting "in concert")

Reproductive Health Servs. v. Lee, 712 S.W.2d 718 (Mo. Ct. App. 1986) (affirming permanent injunction enjoining defendants and those in concert from trespassing on clinic premises; impeding ingress or egress from the facility)

Right to Life Advocates v. Aaron Women's Clinic, 737 S.W.2d 564 (Tex. Ct. App. 1987), cert. denied, 488 U.S. 824 (1988) (affirming injunction enjoining defendants from entering or trespassing on clinic premises for the purposes of picketing, counseling, physically confronting on harassing customers or employees or distributing information)

Welsh v. Johnson, 508 N.W.2d 212 (Minn. Ct. App. 1993) (affirming restraining order entered against defendant enjoining him from coming within 15 feet of clinic director or within two blocks of her home and from continued surveillance of her)

APPENDIX II

APPENDIX II:

Unreported Florida State Cases Issuing or Upholding Similar Injunctions*

Broward County N.O.W. v. Randall Terry, Civ. No. 89-31922 CT-15 (Fla. Cir. Ct. Jan. 10, 1990) (enjoining defendants and those in concert from impeding entrance to or exit from any facility where abortions are performed in Broward County; demonstrating within 15 feet of any person entering or leaving; physically abusing anyone entering or leaving; causing physical damage to facility)

Dade County N.O.W. v. Randall Terry, et al., Civ. No. 90-18586 (Fla. Cir. Ct. Apr. 21, 1990) (enjoining defendants and those in concert, including Rescue America, from blocking entrance to or exit from any facility in Dade County where abortions performed or family planning services provided; physically abusing anyone entering or exiting such facility)

Family Planning v. Raney, Civ. No. 93-31464-CICI (Fla. Cir. Ct. July 13, 1993) (enjoining defendants and those in concert from blocking entrance or exit to the clinic facility; congregating within 36 feet of the property line; during hours of surgical procedures and recovery, making noises audible inside the clinic, or displaying images visible from the clinic; approaching anyone seeking services at the facility within 300 feet of the facility, unless the person indicates a desire to be approached; sidewalk counseling is allowed within the 300 foot area but never within the 36 foot buffer zone; demonstrating within 300 feet of employees' residences or blockading access to residence; harassing, assaulting or intimidating any employee; jamming phone lines of clinic or employees' residences)

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* Cases are listed in alphabetical order.

Sarasota Women's Health Ctr. v. Operation Rescue, Civ. No. 91-6132-CA-01 (Fla. Cir. Ct. Dec. 21, 1992) (enjoining defendants and those in concert from making any noise audible above general traffic noise from inside the clinic or clinic employee's home nearby; going within 10 feet of or crossing the driveway to the clinic)

South Palm Beach County N.O.W. v. Randall Terry, Civ. No. CI 89-4336-AN (Fla. Cir. Ct. Jan. 22, 1993) (enjoining defendants and those in concert from blocking entrance to or exit from any facility where abortions are performed in South Palm Beach County; demonstrating within 25 feet of any persons seeking access or leaving; physically abusing, harassing, or impeding any person entering or exiting; making noise that interferes with the normal activities on the premises)

Women's Health Ctr. v. Operation Rescue, et al., Civ. No. 91-9428 (Fla. Cir. Ct. Oct. 7, 1992) (enjoining defendants, including Judy Madsen, Ed Martin, and Shirley Hobbs, from blocking entrance to or exit from any facility performing abortions in Orange or Osceola County; physically abusing or tortiously harassing anyone entering or exiting)

APPENDIX III

APPENDIX III

STATEMENTS OF INTEREST OF AMICI CURIAE

The **NOW Legal Defense and Education Fund** (NOW LDEF) is a leading national non-profit civil rights organization that performs a broad range of legal and educational services in support of women's efforts to eliminate sex-based discrimination and to secure equal rights. NOW LDEF was founded as an independent organization in 1970 by leaders of the National Organization for Women. A major goal of NOW LDEF's work is to secure reproductive rights and specifically to ensure that women have access to clinics. To this end, NOW LDEF has litigated numerous cases against Operation Rescue, including Bray v. Alexandria Women's Health Clinic, 113 S.Ct. 753 (1993), which was argued by the legal director of NOW LDEF, and several cases with existing injunctions similar to the ones at issue here, including New York State Nat'l Org. for Women v. Terry, 697 F. Supp. 1324 (S.D.N.Y. 1988) and 704 F. Supp. 1247 (S.D.N.Y.), appeals consolidated and aff'd as modified, 886 F.2d 1339 (2d Cir. 1989), cert. denied, 495 U.S. 947 (1990), and Nat'l Org. for Women v. Operation Rescue, 726 F. Supp. 300 (D.D.C. 1989), 747 F. Supp. 760 (D.D.C. 1990), appeal pending, Nos. 91-7001, 91-7006 (D.C. Cir.).

The **National Organization for Women** ("NOW") is the nation's largest feminist organization devoted to the advancement of women's rights, with over 280,000 members and more than 700 chapters in all 50 states and the District of Columbia. NOW has, since its inception, worked for reproductive freedom for all women. In addition to bringing the case National Org. for Women v. Scheidler, 114 S.Ct. 798 (1994), and Bray v. Alexandria Women's Health Clinic, 113 S.Ct. 753 (1993), it is also the plaintiff in several cases with existing injunctions similar to

the ones at issue here, including New York State Nat'l Org. for Women v. Terry, 697 F. Supp. 1324 (S.D.N.Y. 1988) and 704 F. Supp. 1247 (S.D.N.Y.), appeals consolidated and aff'd as modified, 886 F.2d 1339 (2d Cir. 1989), cert. denied, 495 U.S. 947 (1990), and Nat'l Org. for Women v. Operation Rescue, 726 F. Supp. 300 (D.D.C. 1989), 747 F. Supp. 760 (D.D.C. 1990), appeal pending, Nos. 91-7001, 91-7006 (D.C. Cir.).

John E. Cowles is a private attorney in Wichita, Kansas, who represents George R. Tiller, M.D., and Women's Health Care Services, P.A. In 1991, Mr. Cowles obtained an injunction in federal court to prohibit Operation Rescue from blockading the clinic entrances. Women's Health Care Services v. Operation Rescue-National, 773 F. Supp. 258 (D. Kan. 1991), app. pending, No. 91-3250 (10th Cir. Oct. 11, 1991). Mr. Cowles also represented Women's Health Care Services as amicus curiae in the appeal by the City of Wichita successfully challenging the applicability of the "necessity defense" in prosecutions of abortion protestors who trespass on clinic property to interfere with access. City of Wichita v. Tilson, 855 P.2d 911 (Kan. 1993). After Dr. Tiller was shot twice while leaving the clinic on August 19, 1993, Mr. Cowles began working with the Wichita city council to develop a buffer zone ordinance that would separate protestors from the immediate vicinity of the clinic entrances, while preserving other areas for peaceful protests. The outcome of this case will provide guidance to Wichita and other municipalities in developing such ordinances.

Lucinda M. Finley is a Professor of Law at the State University of New York at Buffalo Law School, and she is counsel for several medical facilities that provide abortion and other reproductive health services in Buffalo and Rochester, New York. These medical facilities, their staff,

Rochester, New York. These medical facilities, their staff, and patients have frequently been disrupted, impeded, and harassed by Operation Rescue. Consequently, Professor Finley's clients are currently protected by an injunction similar to the one involved in this case. Pro-Choice Network v. Project Rescue, 799 F. Supp. 1417 (W.D.N.Y. 1992). Operation Rescue is asserting similar First Amendment challenges to the buffer zone and sidewalk counseling restrictions in that injunction, and the U.S. Court of Appeals heard oral argument on these First Amendment issues on March 24, 1994. Pro-Choice Network v. Project Rescue, No. 92-7302 (2d Cir.). The ability of Professor Finley's clients safely to render medical care will be directly affected by the outcome of this case.

No. 93-880

Supreme Court, U.S.
FILED
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

JUDY MADSEN, ED MARTIN, and SHIRLEY HOBBS,

Petitioners,

—v.—

WOMEN'S HEALTH CENTER, INC., AWARE WOMAN CENTER FOR CHOICE, INC., EPOC CLINIC, INC., AND CENTRAL FLORIDA WOMEN'S HEALTH ORGANIZATION, INC.,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

BRIEF OF THE CENTER FOR REPRODUCTIVE LAW & POLICY, NATIONAL ABORTION AND REPRODUCTIVE RIGHTS ACTION LEAGUE (NARAL), WOMEN'S LAW PROJECT, WOMEN'S LEGAL DEFENSE FUND, NATIONAL WOMEN'S LAW CENTER, and AMERICAN JEWISH COMMITTEE, AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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**Counsel of Record*

Dated: April 1, 1994

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No. 93-880

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1993

JUDY MADSEN, ED MARTIN, and SHIRLEY HOBBS,

Petitioners,

v.

WOMEN'S HEALTH CENTER, INC.,
AWARE WOMAN CENTER FOR CHOICE, INC.,
EPOC CLINIC, INC., AND
CENTRAL FLORIDA WOMEN'S HEALTH
ORGANIZATION, INC.,

Respondents.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF FLORIDA

BRIEF OF THE CENTER FOR REPRODUCTIVE LAW & POLICY, NATIONAL ABORTION AND REPRODUCTIVE RIGHTS ACTION LEAGUE (NARAL), WOMEN'S LAW PROJECT, WOMEN'S LEGAL DEFENSE FUND, NATIONAL WOMEN'S LAW CENTER and AMERICAN JEWISH COMMITTEE, AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

This *amici curiae* brief is submitted in support of Respondents Women's Health Center, Inc., Aware Woman Center for Choice, Inc., EPOC Clinic, Inc., and Central Florida Women's Health Organization, Inc. By letters filed with the Clerk of the Court, Petitioners and Respondents have consented to the filing of this brief.

INTEREST OF AMICI CURIAE

The Center for Reproductive Law & Policy, the National Abortion and Reproductive Rights Action League (NARAL), the Women's Law Project, the Women's Legal Defense Fund, the National Women's Law Center, and the American Jewish Committee are all advocacy groups that seek to ensure women's equal rights and to protect women's access to safe reproductive health care. *Amici curiae* have a particular interest in halting the concerted violence, harassment and intimidation being directed against women seeking abortions and against clinics, physicians and staff providing abortion services. *Amici* seek to ameliorate the public health and public safety crisis that now exists as a result of the violence and climate of fear created by anti-choice militants in Florida and throughout the United States and the resultant shortage of physicians and clinics willing to provide abortion services. *Amici* have specific concerns for the health and well being of low-income women who disproportionately rely on reproductive health care clinics for their medical needs. Individual statements of interest of each *amici* are attached hereto as Appendix A.

SUMMARY OF ARGUMENT

The Florida Supreme Court correctly approved the Amended Permanent Injunction ("the Injunction") issued by the Eighteenth Judicial Circuit of Florida. This injunction was issued in response to a persistent campaign of violence, harassment, and intimidation targeted at women who seek abortions and the clinic, physicians and staff who provide abortion services in Melbourne, Florida. Indeed, the Injunction was issued based on extensive evidence and detailed findings of fact only after repeated violations of a prior injunction and continued threats to public health and safety.

Moreover, this pervasive campaign of violence and intimidation extends far beyond the one clinic in one state at issue in this case. It is an organized nationwide campaign using similar tactics at reproductive health clinics across the United States. Thus, in analyzing the Injunction, this Court should consider that the facts of this case illustrate part of a broader nationwide climate of harassment and intimidation in which reproductive health care is provided. This severe national crisis creates a strong governmental interest in restricting disruptive activities to the degree necessary to protect women's health and safeguard women's constitutional right to choose abortion.

It is critical that trial courts retain the authority to enjoin the type of activities addressed by the injunction below. To put an end to nationwide lawlessness and intimidation, to protect public health, and to ensure that women are able to exercise their constitutional right to choose abortion, *amici* respectfully urge this Court to affirm the decision of the Supreme Court of Florida.

ARGUMENT

I. VIOLENCE, HARASSMENT AND INTIMIDATION DIRECTED AT WOMEN SEEKING ABORTIONS AND THEIR HEALTH CARE PROVIDERS POSE A SERIOUS THREAT TO PUBLIC HEALTH AND IMPEDE WOMEN'S ABILITY TO EXERCISE THEIR CONSTITUTIONAL RIGHT TO CHOOSE ABORTION.

Since *Roe v. Wade*, 410 U.S. 113 (1973), the landmark decision finding constitutional protection for the right to choose abortion, anti-choice zealots have sought to make abortion a crime, or, at the very least, unavailable. While some anti-choice organizations and individuals have adopted peaceful and lawful methods, a significant and continually increasing number rely on extreme acts that range from large and sometimes violent blockades and clinic invasions to stalking, bombings, arson, and even murder.

This nationwide crisis of anti-choice violence has escalated since *Planned Parenthood v. Casey*, 112 S. Ct. 2791 (1992), in which this Court reaffirmed the right, albeit diminished, to abortion, and *Bray v. Alexandria Women's Health Clinic*, 113 S. Ct. 753 (1993), which left women without an adequate means of protecting that right.[1] Indeed, the Court's ruling in *Bray* was interpreted by anti-choice

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[1]In *Bray*, this Court found that 42 U.S.C. § 1985(3) did not protect women's privacy rights against anti-choice violence, coercion and intimidation. Subsequent to *Bray*, the Court decided *National Organization for Women v. Scheidler*, 114 S. Ct. 789 (1994), which found that economic motive was not required for a RICO violation within the context of alleged anti-choice extortion and left open the possibility of a federal remedy in a limited number of cases. The level of violence, harassment and intimidation nationwide, however, continues to increase.

militants as a message that they would not be held accountable for their coercive and violent activities.

Having failed to see *Roe* completely overturned or the Human Life Amendment passed, the anti-choice forces have shifted their focus toward preventing abortion by harassing, threatening, and intimidating women seeking services at reproductive health care clinics, and physically denying women access to the clinics through massive clinic blockades. The most recent tactic of anti-choice militants involves driving physicians out of the profession by extortion and threats of violence.[2] As a result of both direct intimidation and tormenting beleaguered reproductive health care providers, women's health has been critically jeopardized. Moreover, as is often the case when access to health care is imperiled, these tactics have impacted low-income women, women of color, and young women most severely.

A. In Florida And Across The Nation Threats And Violence Against Women Seeking Abortions And Their Health Care Providers Are Severe And Escalating.

The trial court's factual findings, and the evidence upon which they were based, illustrate extreme tactics employed by militant anti-choice groups. For years, Respondent Aware Woman Center for Choice ("the clinic"), its staff and patients have experienced massive violence, harassment, and intimidation. *See* Joint Appendix ("J.A.") at 13, 14, 15, 51,

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[2]Joseph Scheidler has stated:

> We haven't been successful in getting the Human Life Amendment passed or in getting *Roe* overturned. When you get doctors out, you can have all the laws on the books you want and it doesn't mean a thing.

Abortion Foes Strike at Doctors' Home Lives, Washington Post, April 8, 1993, A1 at A17.

53, 146, 158-164, 174-79, 189-92, 194, 195-96, 496-506 514-15, 534, 555-56. In addition to physical intimidation including pushing, shoving, and surrounding targeted individuals, this harassment includes threats and shouting very close to the faces of patients and staff. *See* J.A. at 14, 54, 177-79, 189-92, 555-56. Anti-choice protesters also intimidate patients and staff by surrounding them in their cars, and physically blocking access to the clinic.[3] *See* J.A. at 51, 146, 194, 534. Moreover, they shout in the direction of the surgery room and the screaming is heard inside.

Other harassing tactics include tracing patients' identities through license plates and tracking them down in their homes or places of employment. The militant protesters have called patients' family members, employers, and acquaintances to insult the women and reveal intimate information.[4] In addition, they stalk and threaten clinic staff members and intimidate the children and family of clinic staff. *See* J.A. at 13, 14, 53, 55, 158-64, 174-79, 189-92, 195-96, 496-506, 514-15. They also vandalize property on clinic grounds and tie up the clinic phone lines to medical personnel. *See* J.A. at 13, 14, 55, 537. These anti-choice tactics have continually escalated in severity and frequency.

The facts presented in this case are typical of the experiences of women seeking reproductive health care and their health care providers all over the country. The pervasive nationwide climate of violence and intimidation targeted at abortion providers has been recognized by the United States

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[3]The anti-choice protesters also walk directly in front of cars while pushing a baby carriage in order to force the cars to stop. After the protesters force cars to stop, they continue their harassment until they can intimidate patients into opening their windows. *See* J.A. 146-47.

[4]Patients are so concerned about harassment that many remove their license plates in violation of state law. *See* J.A. at 296-97.

Senate and House of Representatives, both of which have held extensive hearings on the issue,[5] by the Attorney General of the United States,[6] countless state and federal courts that have issued injunctions, and numerous journalists.[7]

In the last 17 years, there have been more than 6,000 blockades at reproductive health care clinics and over 1,000 acts of violence.[8] Violent acts include at least 36 bombings, 81 arsons,[9] 131 death threats, 84 assaults, two kidnappings, 327 clinic invasions,[10] and one murder. *Id.* In addition to

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[5]Freedom of Access to Clinic Entrances Act of 1993: Senate Hearings before the Senate Comm. on Labor and Human Resources, 103D Cong, 1st Sess. (1993) ("Senate Hearings". House Judiciary Comm., Subcommittee on Crime and Criminal Justice (the "1993 House Hearings").

[6]Senate Hearings at 12 (Testimony of Janet Reno, Attorney General).

[7]Tamar Lewin, *Clinic Firebombed in PA*, The New York Times, Sept. 30, 1993, at A16; William Hamilton, *Arson Suspected As Abortion Clinic in Conservative Bakersfield Burns*, The Washington Post, Sept. 21, 1993, at A3; William Booth, *Abortion Battle Fatigue - Slain Physician's Replacement Vents Fears, Frustration*, The Washington Post, May 17, 1993, at A3; Fellicity Barringer, *Abortion Clinics Preparing For More Violence*, The New York Times, March 12, 1993, at A1.

[8]1993 Senate Hearings at 3, NAF, Incidents of Violence & Disruption Against Abortion Providers, 1993, April 16, 1993 (summary submitted to the Committee with the testimony of Willa Craig).

[9]If attempted arsons and bombings are also taken into account, the number of arson and bombings is nearly 200 since 1977. NAF, *Incidents of Violence & Disruption Against Abortion Providers, 1993*, November 12, 1993.

[10]During clinic invasions abortion providers have been "pinched, hit, grabbed, kicked," slammed against walls, dragged outdoors, crushed by

(continued...)

destroying clinics and severely limiting access to health care, arson and bombings have resulted in injuries and caused millions of dollars in damage.[11]

Moreover, the anti-choice militants have been using increasingly destructive tactics. "The number of protesters have increased," and more police involvement is required.[12] "Picketers who once appeared satisfied to walk back and forth in front of [clinics] with signs [have been] joined by individuals who on a weekly basis block driveways, scream at staff, and interfere with patients attempting to enter [reproductive health care] facilities.[13] The harassment of patients has intensified, both at the clinic and at women's homes or places of employment. New tactics have also been introduced, such as chemical attacks with butyric acid.[14] Since January 1992, 74 chemical attacks have been reported in 16

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[10](...continued)
crowds, and terrorized with drive-by shootings. Senate Hearings at 4 (ABC, "Nightline," Mar.12, 1993 (Interview with Linda Taggart, Director, Ladies Center, Pensacola, Fla.); NAF, *Incidents of Violence & Disruption against Abortion Providers, 1993*, November 12, 1993.

[11]1993 Senate Hearings at 5. David A. Grimes, M.D., et al., "An epidemic of antiabortion violence in the US." *Obstetrics and Gynecology*, vol. 165, n.5, pt.1 (Nov. 1991): 1263-67 (submitted to the Committee with the testimony of Pablo Rodriguez, M.D.); UPI, *"Suspicious Fire Destroys Abortion Clinic,"* Jan.31, 1992.

[12]Senate Hearings at 7.

[13]*Id.*

[14]Butyric acid creates an intolerable stench, causes nausea, vomiting, headaches, dizziness, inflamed eyes and skin, and difficulty in breathing. It also destroys furniture and carpets. Several people have been hospitalized after chemical attacks on clinics. Senate Hearings at 6, (NAF, *Noxious Chemical Vandalism Incidents at Abortion Clinics*, May, 1993).

states.[15] Statistics compiled by the National Abortion Federation (NAF) confirm the recent dramatic increase in reported incidents of harassment and violence against abortion providers and women seeking abortion.[16]

The violence finally escalated in the murder of Dr. David Gunn in Florida in 1993.[17] *See* J.A. at 190-96. Subsequently, another physician, Dr. George Tiller was shot in both arms during an abortion protest in Wichita, Kansas.[18] Dr. Gunn's murder, and Dr. Tiller's shooting are not isolated incidents; rather these violent criminal acts are an inevitable result of the increasingly violent climate of anti-choice protests and campaigns. Prominent figures in the anti-choice movement have been quoted as saying that the killing of doctors who

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[15]There is a pattern of attacking several clinics in an area at once with butyric acid. Since the attack forces clinics to close for repairs, this strategy eliminates services in the entire area. Senate Hearings at 6 (NAF, *Noxious Chemical Vandalism Incidents at Abortion Clinics*, May, 1993).

[16]For example, between 1993 and March, 1994, reports of attempted bombing and arson incidents at clinics totalled 8; reports of vandalism reached 132; reports of clinic blockades totalled 79; reports of arson incidents at abortion clinics reached 9. National Abortion Federation, *Incidents of Violence and Disruption Against Abortion Providers*, 1994.

[17]Previously there had been shootings and serious injuries. For example, in December of 1991, a man in a ski mask opened fire with a sawed-off shotgun at a clinic in Springfield Missouri. He wounded two clinic staff, including the office manager who is paralyzed as a result of the shooting. Richard Lacayo, *One Doctor Down, How Many More?*, Time, March 22, 1993, at 46.

[18]*Abortion Foe Charged in Shooting of Doctor*, New York Times, Aug. 24, 1993; Dirk Johnson, *Abortions, Bibles and Bullets, And the Making of a Militant*, New York Times, Aug. 28, 1993, at A1.

perform abortions is justified "on behalf of the unborn."[19]

Both Dr. Gunn and Dr. Tiller were shot during anti-choice protests, and might have been protected by an injunction such as the one issued herein, requiring anti-abortion activity to remain at a safer distance. The escalating violence has created a climate of terror for physicians providing reproductive health services. Physicians' lives are being continually threatened.[20] Moreover, the threats, harassment and intimidation are also directed at the families of reproductive health professionals.[21]

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[19]Senate Hearings at 4. (testimony of Michael Bray, Coordinator of Operation Rescue, Washington D.C.).

[20]Death threats to abortion providers include statements like: "Hey * * * [Dr.] Boyd. Those babies didn't know when they were dying by your butcher knife. So now you will die by my gun in your head very soon - and you won't know when - like the babies don't. Get ready your [sic] dead," Senate Hearings at 10, (Statement of Fairmount Center, Senate Committee on Labor and Human Resources Committee, June 2, 1993); "and [o]bviously you don't know what a real 'terrorist' is, [p]erhaps someday soon you will, [t]hink not that I am come to send peace on earth[,] I came not to send peace, but a sword." Written Testimony of Norman T. Tompkins, M.D., House Subcommittee on Crime and Criminal Justice, Committee on the Judiciary, April 1, 1993, Exhibit 4.

[21]Dr. Norman Tompkins of Dallas, Texas received the following message on his answering machine: "I'm going to cut your wife's liver out and make you eat it. Then I'm going to cut your head off * * *" 1993 House Hearings at 10 (Written Testimony of Norman Tompkins, M.D., House Subcommittee on Crime and Criminal Justice, Committee on the Judiciary, April 1, 1993). Additionally, "[a] member of the Pro-Life action Network confronted Dr.Tompkins wife and shouted, 'Aren't you afraid I'm going to kill you?'". Senate Hearings at 10, (Statement of Facts, *Tompkins v. Cyr*, No.93-1337-F (D. Dallas County, Tex.) (Filed March 30, 1993), p.3 (submitted as written testimony of Norman Tompkins, M.D.)). In addition to threats the families of providers are subject to harassment. For example, the anti-choice group Lambs of

(continued...)

Pablo Rodriguez, M.D.,[22] asking the Senate "to walk just a few yards in my shoes and feel what thousands of health care providers across the country feel every day of their lives," 1993 Senate Hearings, Rodriguez Testimony at 2, described his experiences as a reproductive health care provider:

> In the beginning, the harassment was the usual nasty letter and graphic pictures of dismembered fetuses; but slowly it became more aggressive. I began receiving strange packages with dolls inside, as well as subscriptions to gun magazines and hunting lodges, showing pictures of dead animals hanging by their extremities. Then the "Wanted Posters" began to appear . . . . Then the doors and locks to our clinic were glued on multiple occasions[23] culminating with three episodes of forceful blockading of our clinic. . . . The day Dr. Gunn was shot, I knew that my life would irrevocably change. One week after his death, as I was driving my mother to the bus station, I realized that my car was steering poorly. Once I dropped her off, I examined my tires and found that there were 45 nails deeply embedded in them; a fortunate finding considering that I was

[21](...continued)
Christ followed a Minnesota physician's daughter to school, and passed out leaflets there which stated "Sonia's Mom Kills babies." Sandra Boodman, *A Doctor's Story: A Firm Belief That 'What Goes Around Comes Around*, Washington Post, Apr. 8, 1993, A16.

[22]Dr. Rodriguez is a clinical assistant professor of Obstetrics and Gynecology at Brown University Medical School, a fellow of the American College of Obstetricians and Gynecologists, and the Medical Director of Planned Parenthood of Rhode Island.

[23]The doors of Respondent Aware Woman Center for Choice were also vandalized with glue. *See* J.A. at 24.

> driving over 50 miles an hour on the highway. That evening, when I returned home, still unaware of the location of this act of vandalism, my wife painfully discovered with her foot that my driveway was "booby-trapped" with roofing nails cleverly buried under the snow. An image of my young children running and skinning their knees on that same section of driveway has filled my heart with a fear that, until this day, I have not been able to shake off. The following week I received a bill for an insurance policy on my wife's life [which we had not applied for.]

Id. at 3-4.

Finally, this violence, harassment, and intimidation do not only occur locally; it is coordinated and planned strategically on a national level. These incidents at various clinics throughout the country are not merely disparate, local events. Rather, anti-choice zealots travel all over the country targeting a few regions at a time. For example, from July to August of 1991, thousands of anti-choice activists came from around the country to launch attacks on clinics in Wichita, Kansas.[24] The massive assaults and blockades so overwhelmed the local Wichita police that 100 federal marshals had to be called in to control the mob violence.[25] The six week protest cost the City of Wichita approximately one million dollars and led to more than 2,741 arrests.[26]

In this case, there was a training camp, the Institute for

[24]*U.S. v. Cooley*, 787 F.Supp. 977, 980 (D. Kan. 1992). 1993 Senate Hearings at 9.

[25]Id.

Mobilized Prophetic Activist Christian Training (IMPACT), for anti-abortion activities[27] in Melbourne 1 1/2 - 2 miles from Respondent Aware Woman Center for Choice. *See* J.A. at 97-106, 247-251. Trainees came from all over the country, and funds were raised nationally to support them during training. *See* J.A. at 40-43. Thus, Respondent Aware Woman Center for Choice was targeted as part of a national campaign that instigates violence, fear and intimidation across the country.

B. The Climate Of Fear And Intimidation Created By The Violent Tactics of Anti-Choice Militants Directly Jeopardizes Women's Health And Curtails Access to Abortions.

The coercive and violent tactics employed by anti-choice organizations severely endanger women's health and create a dangerous shortage of abortion providers. Women's health is endangered as a result of direct harassment and by anti-choice tactics that block access to necessary health care at crucial moments, and by the shortage of abortion providers.

In assessing the impact of anti-choice threats, violence, harassment and intimidation, this Court should keep in mind that women are targeted immediately prior to and during a surgical procedure.[28] Harassment at this time and in this context heightens the health risk for women by causing

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[27]Trainees were instructed how to harass, intimidate, and stalk clinic personnel and patients, and how to blockade clinics. *See* J.A. at 40-43.

[28]Abortion is an extremely safe surgical procedure, particularly when performed under normal circumstances. Stanley K. Henshaw, *Induced Abortion: A World Review, 1990*, 22 Fam. Plan. Persp. 13 (1990). It remains, however, a surgical procedure and requires anesthesia, with its attendant risks. *See* J.A. at 152-53.

hypertension, stress, and/or anxiety.[29] These conditions, in turn, will force physicians to anesthetize their patients with higher doses of sedatives or, if the hypertension is severe, to turn the patient away altogether.[30] Indeed, the trial court found that women attempting to obtain reproductive health

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[29]*In Pro-Choice Network of Western New York v. Project Rescue Western New York*, 799 F. Supp. 1417 (W.D.N.Y. 1992), where the court granted an injunction against activity by anti-choice militants, it noted:

> uncontradicted testimony that the risks associated with an abortion increase if the patient suffers from additional stress and anxiety. Increased stress and anxiety can cause patients to: (1) have elevated blood pressure: (2) hyperventilate; (3) require sedation; or (4) require special counseling and attention before they are able to obtain health care. Patients may become so agitated that they are unable to lie still in the operating room thereby increasing the risks associated with surgery.

Pro-Choice Network, 799 F. Supp. at 1427. *See also National Organization for Women v. Operation Rescue*, 726 F. Supp. 1483, 1489 (E.D. Va. 1989), *aff'd*, 914 F.2d 582 (4th Cir. 1990), *rev'd in part, vacated in part sub nom, Bray v. Alexandria Women's Health Clinic*, 113 S. Ct. 753 (1993) ("a 'rescue' demonstration creates a substantial risk that a clinic's patients may suffer physical and mental harm"); *Cousins v. Terry*, 721 F. Supp. 426, 432 (N.D.N.Y. 1989) (testimony that women who gained entrance to the clinic were "traumatized by the ordeal" of having to be escorted through demonstrators shouting insulting epithets); *N.Y. State National Organization for Women v. Terry*, 704 F. Supp. 1247, 1260-61 n. 17, 1262 (S.D.N.Y. 1989), *aff'd as modified*, 886 F.2d 1339 (2d Cir. 1989), *cert. denied*, 495 U.S. 947 (1990).

[30]*Id.* If women are turned away and forced to reschedule their appointments they suffer all the increased risks associated with delay. *See infra* at 14.

care from Respondents suffered these very effects.[31]

Additionally, women who are prevented from gaining access to a clinic by a blockade,[32] or who are intimidated from entering a clinic because of threatening protests,[33] delay obtaining their abortions.

> This delay can increase the risks associated with an abortion. For example, the delay may move the pregnancy from the first trimester to the second trimester during which the risks associated with the procedure increase. Other women who are seeking a post-abortion check-up might delay their appointment or simply cancel it altogether, thereby enhancing the possibility of complications. For some women who elect to undergo an abortion, clinic medical personnel prescribe and insert a device known as a pre-abortion laminaria to achieve cervical dilation. In these instances, timely removal of the laminaria is necessary to avoid infection, bleeding and other potentially serious complications. If a woman returning to have the laminaria removed finds that her access to the clinic entrance is blocked or impeded . . ., complications may result.

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[31]*See* J.A. at 152-54. In addition to harassing women on their way into the clinic, anti-choice militants even climb up on ladders placed alongside a clinic fence from where they shout and hold up grotesque and frightening pictures in the windows of the clinic in order to be heard and seen in the surgery room during procedures. *See* J.A. at 551-52.

[32]*See* J.A. at 154-55.

[33]*See* J.A. at 145-47, 547-553.

Pro-Choice Network, 799 F. Supp. at 1427.[34]

Moreover, anti-choice violence and harassment particularly endanger women during medical emergencies. Anti-choice groups commonly use tactics to block access to medical personnel such as tying up phone lines at reproductive health care facilities. This prevents women experiencing medical emergencies from contacting their physicians. Additionally, militants interfere with patients being transported by ambulances from clinics to hospitals. *See* Abortion Clinic Violence: Oversight Hearings Before the Subcommittee on Civil & Constitutional Rights of the House of Representatives, 99th Cong., 1st & 2nd Sess. (1985-86) at 23-24 (Testimony of Beverley Whipple) ("1985-86 House Hearings"). Other tactics include endangering women through fraud, deceit and intimidation. For example, in one instance:

> a patient who spoke only limited English returned to have a laminaria procedure completed, she was taken by anti-choice demonstrators to a doctor who removed some of the dilators and told her to continue the pregnancy. Fortunately, she was contacted by the clinic and was able to have her pregnancy terminated. . . . had the dilator not been removed, "th[e] situation was potentially life-threatening."

Written statement of Fairmount Center, Senate Labor and Human Resources Committee, June 2, 1993. 1993 Senate Hearings at 16.

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[34]*See also Planned Parenthood Association of San Mateo County v. Holy Angels Catholic Church*, 765 F. Supp. 617, 620 (N.D. Cal. 1991) (women are often so upset by protesters that they reschedule appointments and obtain later, and therefore more dangerous, medical procedures); *Roe v. Operation Rescue*, 710 F. Supp. 577, 582 (E.D. Pa. 1989) (woman denied necessary medical services in Pennsylvania as a result of blockade), *aff'd*, 919 F.2d 857 (3d Cir. 1990).

Moreover, anti-choice militants' concerted efforts to deter physicians from providing abortion services have been effective: this country faces a dire shortage of physicians who are trained and willing to provide abortions. The reduction in the number of providers results in increased cost and travel burdens. Consequently, reproductive health care is unavailable to increasing numbers of women who lack the means necessary to exercise their constitutional right to choose abortion.

During the last two decades, there has been a steady decline in the number of facilities and clinicians willing to provide abortion services. The decline in the number of abortion providers is directly attributable to organized efforts by extremist anti-choice organizations and individuals.[35] As early as 1985, Dr. Stubblefield testified before Congress that aggression by anti-choice groups had forced "two very able Medical Directors" to leave Planned Parenthood of Massachusetts at Worcestor. Since Dr. Gunn's slaying, at least eight physicians have stopped performing abortions, including Dr. Snydle who worked at Respondent Aware Woman Center for Choice clinic.[36]

A survey released in 1990 found that only 17 percent of the counties in the United States have an abortion provider.[37]

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[35]In addition, as a direct result of the organized harassment, clinics are finding it nearly impossible to fill physician positions. *See Abortion Clinics Seek Doctors But Find Few*, The New York Times, March 31, 1993 at A-14; *The Dearth of Abortion Doctors*, The Washington Post, April 20, 1992 at 7.

[36]*Doctors Say Abortion Foes Intimidating*, USA Today, April 13, 1993 at 2A.

[37]In addition, fewer and fewer doctors are willing to provide later abortions, which are more often required in cases where the woman is

(continued...)

Stanley K. Henshaw & Jennifer Van Vort, *Abortion Services in the United States, 1987 and 1988*, 22 Fam. Plan. Persp. 102, 106 (1990). Only 7 percent of the counties in rural areas have an abortion provider.[38] Thirty-one percent of women of childbearing age live in a county in which no abortion services are available.[39]

The lack of services has the greatest impact on low-income, rural, and young women. Women without the resources to travel to a provider -- or to pay for the procedure -- are more likely to obtain an abortion later in their pregnancies, when health risks are significantly greater and costs for the procedure are substantially higher, or to be forced to carry an unwanted pregnancy to term. Moreover, since low-income women rely on clinics disproportionately for a wide variety of reproductive health care, they are particularly harmed when clinics are forced to close their doors.[40]

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[37](...continued)
young or low-income, because these groups of women tend to obtain abortions later in pregnancy. Carolyn Westhoff, M.D., *Residency Training in Contraception, Sterilization and Abortion*, Obstetrics & Gynecology, Vol. 81 No. 2, Feb. 1993.

[38]*Id.* at 106.

[39]*Id.* at 106.

[40]For example,

> The Blue Mountain Clinic in Missoula, Montana was burned to the ground in 1992, following several years of escalating blockades. Seventy percent of the clinic's pre-natal program was comprised of Medicaid patients who had travelled an average of 120 miles for their appointments due to lack of care in their own areas. Western Montana's growing population of uninsured, working poor, and Medicare/Medicaid dependent citizens suffered a severe

(continued...)

In sum, despite the fact that the right to choose abortion has been constitutionally protected for twenty years, anti-choice zealots have purposely created a climate of fear and intimidation[41] in order to prevent women from exercising their constitutional rights. Criminal violence and threats against clinics and physicians who perform abortions are widespread and have worsened as an organized network of abortion opponents strives, virtually unchecked, to eliminate abortion as a choice for many women. Women and their health care providers should not have to put up with pervasive violence, extortion, death threats, and even murder, in order to obtain necessary reproductive health care.

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[40](...continued)
curtailment of medical services as a result.

Testimony of Willa Craig, Executive Director of the Blue Mountain Clinic, Missoula, MT. Senate Committee on Labor and Human Services, May 12, 1993. 1993 Senate Hearings at 5.

[41]Randall Terry, the founder of Operation Rescue, vowed, "to do everything we can to torment [abortion providers] . . . to expose them for the vile, blood-sucking hyenas that they are . . . to humiliate them, to disgrace them, which is our right." Sandra Boodman, *Abortion Foes Strike at Doctor's Home Lives - Illegal Intimidation or Protected Protest?*, The Washington Post, March 12, 1993, at E3.

Joseph Scheidler, Executive Director, Pro-Life Action League has said, "The prolife community has moved ahead to restore protection to the unborn . . . nonviolent action to end abortion is preferable . . . but if access to free speech, [and] assembly . . . are denied . . . the violence of abortion will inevitably be opposed by others means. Our methods are open and above board." 1993 House Hearings, Scheidler Testimony at 55.

II. WITHIN THE CONTEXT OF THIS PERVASIVE INTERFERENCE, INTIMIDATION AND INJURY, REASONABLE TIME, PLACE AND MANNER RESTRICTIONS ON DISRUPTIVE ACTIVITIES AT CLINICS AND RESIDENCES ARE NECESSARY TO PROTECT WOMEN'S HEALTH AND TO SAFEGUARD WOMEN'S CONSTITUTIONAL RIGHT TO CHOOSE ABORTION.

This Court should analyze the constitutionality of the Injunction in the context in which it was issued. Thus, this Court should consider not only the pervasive violence and intimidation in which the clinic has been forced to provide services, but also the national backdrop of violence and fear imposed on women seeking reproductive health services and their health care providers. This national context is a critical factor in the analysis because anti-choice organizations, including those who have targeted the clinic, organize their activities on a national level, are not strictly local in nature, and use similar tactics across the United States. This nationwide climate, in turn, affects the perceptions and reactions of women and health care providers targeted for harassment, violence and intimidation. Moreover, the national crisis created by these activities is an important consideration when determining the governmental interest at stake.

The state trial court properly considered both the immediate site-specific context of this case as well as the national backdrop of violence and fear. The court issued the Injunction based on extensive testimony, including a videotape, demonstrating the harm and intimidation imposed on the clinic, its staff and patients. *See* J.A. at 5-10, 50-64. Additionally, the trial court issued the Injunction only after blatant violations of a previous injunction. Moreover, the Court considered testimony regarding acts of violence against reproductive health providers, and harassment of women

outside of Melbourne, thereby taking into account the overall climate of fear created by anti-choice zealots nationwide. *See* J.A. at 54, 155, 195-99.

A. Conduct That Interferes With The Provision Of Reproductive Health Care At Clinics May Be Enjoined To Protect The Health Of Patients And To Safeguard Women's Constitutional Right To Choose Abortion.

This Court has "regularly rejected the assertion that people who wish 'to propagandize protests or views have a constitutional right to do so whenever and however and wherever they please.'" *United States v. Grace*, 461 U.S. 169, 177-78 (1983) (citing *Adderley v. Florida*, 385 U.S. 39, 47-48 (1966)).[42] Thus, the context in which expressive conduct occurs, in this instance reproductive health care facilities under siege, is a critical element in evaluating the constitutionality of a restriction.[43] Moreover, because the

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[42]"Even protected speech is not equally permissible in all places and at all times." *Cornelius v. NAACP Legal Defense and Educational Fund*, 473 U.S. 788, 799 (1985). In fact, many of Petitioners' activities are not even protected speech. This Court has made clear that there is no First Amendment right to block a public street or sidewalk or to block ingress and egress to a public or private building in an effort to exercise the rights of free speech and expression. *See, e.g., Cameron v. Johnson*, 390 U.S. 611, 617 (1968) (upholding prohibition on picketing in front of courthouse that interferes with free ingress or egress); *Cox v. Louisiana*, 379 U.S. 559, 562-64 (1965) (*Cox II*); *Cox v. Louisiana*, 379 U.S. 536, 555 (1965) (*Cox I*) (demonstrators may not cordon off street or entrance to a building allowing no one to pass who refused to listen to them).

[43]Indeed, the context of fear and intimidation surrounding reproductive health care clinics is similar to other contexts where the government's (continued...)

context is determinative, a ruling by this Court affirming the decision of the Supreme Court of Florida will be narrow and limited only to circumstances where there has been a history of violence and intimidation combined with a threat to public health and interference with the exercise of constitutionally protected rights.

Restrictions on protected speech are permissible so long as they are limited to a reasonable time, place, and manner.[44]

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[43](...continued)
interest in public health and safety justify restrictions on speech. Recognizing that context can alter the meaning of speech, i.e., a "message" in one context can become a "threat" in another, this Court has even upheld content-based restrictions on speech in order to protect public health and safety. For example, although a statute prohibiting comments or jokes about a "bomb" or "hijacking" might be unconstitutional in some contexts, this Court has upheld statutes criminalizing even offhand remarks about bombs or hijacking if made in airports or airplanes. *See United States v. Irving*, 509 F.2d 1325 (5th Cir.) *cert. denied* 423 U.S. 931 (1975); *United States v. Rutherford*, 332 F.2d 444 (2d. Cir.) *cert. denied* 377 U.S. 994 (1964); *State v. Silver*, 196 F.Supp. 677 (E.D.Pa. 1961); *United States v. Omirly*, 488 F.2d 353 (4th Cir. 1973); *Taylor v. United States*, 358 F.Supp. 384 (S.D.Fla. 1973); *United States v. Allen*, 317 F.2d 777 (2d. Cir. 1963). In doing so, this Court not only recognized the heightened interests in security and public safety inherent in airline travel, but also looked to the history of aviation terrorism and the consequences of terrorist threats -- whether real or pranks -- that led Congress to enact laws banning such speech.

[44]Such restrictions must be content neutral, narrowly tailored to serve a significant government interest, and provide ample alternative channels of communication. *Barnes v. Glen Theatre*, Inc., 111 S. Ct. 2456 (1991); *Frisby v. Schultz*, 487 U.S. 474 (1988); *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984); *Heffron v. International Soc. for Krishna Consciousness*, 452 U.S. 640, 647 (1981); *Greer v. Spock*, 424 U.S. 828, 838 (1976); *Northeast Women's Center, Inc. v. McMonagle*, 939 F.2d 57, 62 (3rd Cir. 1991). The Injunction meets all of these criteria. *See* Brief of Respondents.

In assessing the reasonableness of a time, place, and manner restriction, the Court must look to the governmental interests at stake and the ways in which the expressive conduct impedes those interests. One factor to consider is

> [t]he nature of a place, "the pattern of its normal activities. . . . " [and] . . . whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time.

Grayned v. City of Rockford, 408 U.S. 104, 116 (1972) (quoting *Brown v. Louisiana*, 383 U.S. 131 (1966)). The tactics of the anti-choice zealots at the clinic clearly disrupt the clinic's "normal activity." Indeed, that is the very purpose of these tactics. Moreover, there is a strong government interest in protecting against such a disruption in order to safeguard women's health and women's ability to exercise their constitutional right to choose abortion. Thus, restrictions on disruptive activity, in this context, are constitutionally permissible.

In a long line of cases, this Court has upheld regulation of First Amendment activities in public places that are unsuited for unfettered expression.[45] In *Grayned*, this Court upheld an ordinance prohibiting noise outside a school based on a finding that excessive noise interfered with the central purpose and use of the school. 408 U.S. 104. In *Portland Fem. Women's H. Ctr. v. Advocates for Life*, 859 F.2d 681 (9th Cir. 1988), the Court of Appeals for the Ninth Circuit found, "the interests that render reasonable the regulation of disruptive expression outside schools and courthouses [should] also operate to allow regulation of disruptive expression outside a clinic where medical services including surgery are offered." *Id.* at 686.

There is a significant governmental interest inherent in providing medical services to the public which justifies providing a "quiet zone" around health care facilities limiting where and when expressive conduct is permitted.[46] Indeed, this Court has previously recognized the unique function of medical facilities and the need to maintain quiet and tranquility to protect the health of patients. See *NLRB v. Baptist Hospital*, 442 U.S. 773, 783-785 (1979) (upholding right of employees to solicit where such activity did not interfere with patient care); *Beth Israel Hospital v. NLRB*, 437 U.S. 483 (1978).[47] Moreover, this Court has recognized the government's "legitimate interest in seeing to it that an abortion, like any other medical procedure, is performed under circumstances that insure maximum safety for the

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[45] *Grayned*, 408 U.S. 104 (upholding regulation of disruptive speech in front of schools); *Cox*, 379 U.S. 559 (upholding restriction on disruptive speech near a courthouse); *Tinker v. Des Moines*, 393 U.S. 503, 513 (upholding ordinance punishing conduct that disrupts or is about to disrupt normal school activities); *Perry Educ. Ass'n v. Perry Local Educ. Ass'n*, 460 U.S. 37, 44 (1983). *See Greer v. Spock*, 424 U.S. 828 (1976) (military bases); *Adderley v. Florida*, 385 U.S. 39 (1966), *reh'g denied*, 385 U.S. 1020 (jails and prisons); *Jones v. North Carolina Prisoners' Union*, 433 U.S. 119 (1977) (same).

[46] Florida statutes providing for quiet zones around hospitals. Fla. Stat. 316.3045 (1993).

[47] The Court has also recognized the disruptive nature of loud noise in various contexts including schools, jails, courthouses, and even public parks and upheld anti-noise regulations in these public fora. See *Ward v. Rock Against Racism*, 491 U.S. 781 (1989); *Grayned*, 408 U.S. 104; *Adderly*, 385 U.S. 39; *Cox*, 379 U.S. 559; *Kovacs v. Cooper*, 336 U.S. 77, 78 (1949).

In the context of a medical facility, the governmental interest in maintaining quiet to safeguard the health of patients is particularly compelling. See *Medlin v. Palmer*, 874 F.2d 1085 (5th Cir. 1989) (upholding ordinance that prohibited the use of handheld amplifiers within 150 feet of any school or medical facility).

patient." *Roe v. Wade*, 410 U.S. at 150.[48]

Lower courts, too, have recognized the unique context of medical facilities and the need for a calm and tranquil environment. *See Low Income People v. Manning*, 615 F. Supp. 501, 517 (D.C. Ohio 1985), *amended*, 626 F. Supp. 1344 (N.D. Ohio 1986) (upholding hospital restriction on solicitation based on evidence in the record demonstrating that "the Hospital has sound medical reasons for wishing to keep the lobby and the outpatient waiting areas clear of individuals whose stated aim is to confront and lobby patients and families") (emphasis added); *see also, Tinker*, 393 U.S. at 512 n.6 (comparing public hospitals to jails). The record established in the Florida trial court is replete with evidence of the interference with medical care and the harm to patients' health caused by the disruptive activities of anti-choice militants. *See* J.A. at 52-55.[49]

Additionally, because the right to choose to have a safe and legal abortion is constitutionally protected, the governmental interest in preventing disruptive activity in this context is particularly weighty. In the same manner that the government's significant interest in safeguarding the constitutional right to vote, *Burson v. Freeman*, 112 S. Ct. 1846 (1992), justifies the creation of a "buffer zone" around the polls to protect citizens from intimidation, the significant governmental interest in protecting women's constitutional

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[48] *See also McMonagle*, 939 F.2d at 63 ("The government may 'properly assert important interests in safeguarding health' and 'in maintaining medical standards' as regards the performing of abortions.") (quoting *Roe v. Wade*, 410 U.S. 113 (1973)).

[49] Similar disruptive activities at clinics elsewhere in country have provided the basis for injunctions in numerous courts. *See McMonagle*, 939 F.2d at 63; *Portland*, 859 F.2d at 683, 686-87; *Holy Angels*, 765 F.Supp. at 625-26 (N.D. Ca. 1991).

right to choose abortion justifies the Injunction.

Indeed, the testimony presented to the trial court demonstrates that the intent of the zealots is precisely to prevent women from exercising their constitutional right to choose abortion by disrupting clinic services and driving physicians out of the practice of providing abortion. *See* J.A. 154-55, 505-514. Such flagrant interference with constitutional rights must not be tolerated.

The primary goal of the Florida trial court in issuing the Injunction was to protect the clinic and its patients from irreparable harm; specifically, to protect the ability of the clinic to provide medical services free from interference that endangers the health and safety of its patients and to guarantee the ability of women to exercise their constitutional right to choose abortion. The findings of fact made by the Florida trial court demonstrate that the Injunction was necessary to ensure that these interests were protected.

B. Women Seeking Abortions And Reproductive Health Care Providers Are A "Captive Audience" Who Should Be Protected From Targeted Expressive Conduct.

This Court has recognized a difference between generalized speech and conduct directed at an individual by protesters who "do not seek to disseminate a message to the general public, but to intrude upon the targeted [individual], and to do so in an especially offensive way." *Frisby*, 487 U.S. at 486. "No one has the right to press even good ideas on an unwilling recipient." *Rowan v. United States*, 397 U.S. 728, 737 (1970).

When a case presents a conflict between the right to speak and the right to be left alone, the right of the listener is entitled to considerable weight when the listener is a member

of a "captive audience." *Frisby*, 487 U.S. at 487; *Cohen v. California*, 403 U.S. 15 (1971). In addition to applying the "captive audience" doctrine to individuals entrapped in their homes,[50] *see Frisby* 487 U.S. at 486-87, this Court has applied the doctrine to numerous contexts "when the degree of captivity makes it impractical for the unwilling viewer or auditor to avoid exposure." *Erznoznik v. Jackson*, 422 U.S. 205, 209 (1975). *See Lehman v. Shaker Heights*, 418 U.S. 298 (1974) (passengers on municipally-owned buses).

The captive audience doctrine is particularly applicable to the context of protest activities targeted at reproductive health care clinics because women have no choice but to obtain reproductive health care at the clinic and thus cannot avoid the harassment by "simply avert[ing] their eyes." *Erznoznik* 422 U.S. at 211. Moreover, "privacy" concerns inherent in the constitutional right to choose abortion are related to those concerns at issue in restricting targeted residential picketing.

When women and their health care providers are inside the clinic, they are as captive as they would be in their home,[51] and thus are entitled to protection from disturbing and interfering activity that penetrates the walls and windows of the clinic. *See supra* at 27. Moreover, evidence in the Record illustrates the numerous ways in which the picketers hold women and staff hostage in their cars as they drive to the clinic. *See* J.A. at 52. Women in need of reproductive health care cannot avoid the protesting mobs blocking access to the clinic, thus they are also "captive" as they approach the reproductive health care facility on the sidewalks and streets surrounding the clinic. *See, generally, Too Close for Comfort: Protesting Outside Medical Facilities*, 101-2 Harv.

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[50]*See* discussion at Section C. *infra*, regarding residential picketing.

[51]Indeed, even more so during a surgical procedure, when leaving would endanger a woman's life or health.

L. Rev. 1856, 1863-65 (1987-88).[52]

Third, an application of the captive audience doctrine to the abortion clinic context is also appropriate because of the "privacy" interests inherent in the constitutional right to choose abortion. In articulating the principles behind the captive audience doctrine applied in *Frisby*, this Court identified the "privacy" interests inherent in one's home.[53] These interests also extend to intimate decisions involving bodily autonomy, and procreation. *See Roe*, 410 U.S. at 153-54, *Casey*, 112 S. Ct. at 2807.

Moreover, the constitutional right of "informational privacy," protecting the confidentiality of women seeking abortions, *Casey*, 112 S. Ct. at 2831, 2833, also supports an application of the "captive audience" doctrine to the abortion context. This Court has recognized the intensely "personal," "intimate," and "private" nature of the decision to have an abortion. *Casey*, 112 S. Ct. at 2807. Even under the best of

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[52]Moreover, unlike a public park or street in the middle of town, a "traditional public forum," the restricted area covered by the Injunction serves the specific function of providing access to the clinic. While the general public may *drive* along U.S. 1 and Dixieway, almost no pedestrians stroll along the sidewalks, and virtually no one, other than the protesters congregate along these public ways for extended periods of time. *See* J.A. at 244-45. Thus, this paved area differs from most sidewalks, such as those surrounding the U.S. Supreme Court at issue in *Grace*, 461 U.S. 169, along which citizens regularly walk in conducting their daily activities and which are "indistinguishable from any other sidewalks in Washington, D.C." *Id.* at 1708.

[53]*See Frisby*, 487 U.S. at 484; *see also Thornhill v. Alabama*, 310 U.S. 88 (1940) ("the picketer's right of free expression must be balanced against the individual's right to privacy"); *Town of Barrington v. Lauchie Blake*, 568 A.2d 1015, 1018 (Rhode Island, 1990) ("Individual privacy rights may be protected by reasonable time, place and manner regulations on free speech or expressive activity.").

circumstances, women fiercely guard their confidentiality regarding abortion.

In an effort to directly infringe upon this right to informational privacy, the tactics used by the vigilantes to deter women from obtaining abortions include: copying license plate numbers; identifying and tracking women to their homes; calling or writing to women, their parents or spouses at home; contacting neighbors, ministers, and others in the community; and callously exposing the woman's private decision to others whom the woman does not wish to inform. *See* J.A. at 55.[54] This tactic severely impedes women's exercise of their constitutional right to choose abortion. Indeed, the Record indicates that some women, out of fear that their private decision to have an abortion will be revealed by the protesters -- possibly to abusive parents or partners -- avoid coming to the clinic to obtain an abortion. As a consequence, some women delay the procedure days or weeks thereby risking harm to their health, other women may be forced to carry their pregnancy to term.

The government's interest in protecting women's health and safeguarding their ability to exercise their constitutional right to choose abortion, justifies application of the "captive audience" doctrine to permit additional restrictions against the zealots' cruel and invasive tactics.

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[54]Indeed, anti-choice leader Keith Tucci admitted on national television that Operation Rescue calls clinic patients in their homes in an attempt to dissuade them from abortion, claiming he doesn't see it as an invasion of these women's privacy. *Day One*, October 18, 1993.

C. The Harassment And Intimidation Occurring At The Homes Of Physicians And Clinic Staff May Be Enjoined.

This Court has recognized the importance of "preserving the sanctity of the home, the one retreat to which men and women can repair to escape from the tribulations of their daily pursuits." *Carey v. Brown*, 447 U.S. 456, 471 (1980). "The State's interest in protecting the well-being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society." *Frisby*, 487 U.S. at 484; *see also Rowan v. United States Post Office Dep't*, 397 U.S. 728, 736 (1970); *Kovacs*, 336 U.S. 77.

The tactic of harassing reproductive health care providers and their families at home is widely touted by anti-choice militants. *See* J.A. at 495-514. This particularly cruel strategy -- referred to as the "No Place to Hide" campaign -- seeks to harass and intimidate physicians out of continuing to provide reproductive health care. This strategy is working. The result is a worsening public health crisis as fewer and fewer physicians are willing to suffer the persistent threats and attacks upon themselves and their loved ones. *See supra* at 8-11. To put an end to such abusive harassment, and to ensure that able physicians will continue to provide abortions and other reproductive health care, this Court should uphold the restrictions on residential picketing.

CONCLUSION

For the foregoing reasons, *amici curiae* urge this Court to affirm the judgment of the Florida Supreme Court and uphold the Injunction.

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APPENDIX

INTEREST OF *AMICI CURIAE*

THE CENTER FOR REPRODUCTIVE LAW & POLICY ("CRLP") is a non-profit legal organization dedicated to protecting women's right to choose abortion and to preserving women's access to comprehensive reproductive health care. Attorneys from CRLP have litigated numerous abortion rights cases throughout the country, representing numerous reproductive health care providers and clinics, as well as women seeking their services. In particular, attorneys from CRLP represented the plaintiffs in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 112 S. Ct. 2791 (1992), *Harris v. McRae*, 448 U.S. 297 (1980), and *Hodgson v. Minnesota*, 497 U.S. 417 (1990). In *Casey*, this Court reaffirmed women's constitutional right to abortion. Without access to abortion services, however, this right will be meaningless. The CRLP has a particular interest in halting the campaign of violence, harassment and intimidation directed against women seeking abortions and against physicians and clinics providing abortion services, whose purpose is to make abortion services inaccessible to all women.

THE NATIONAL ABORTION AND REPRODUCTIVE RIGHTS ACTION LEAGUE ("NARAL"), has nearly 800,000 members in 39 state affiliates and the national organization. Founded in 1969, NARAL is the largest organization working primarily to keep abortion safe, legal and accessible for all women. The constituency of NARAL uses the political process to guarantee women the right to make personal decisions regarding reproductive choices, including preventing unintended pregnancy, bearing healthy children, and choosing legal abortion. NARAL works to elect pro-choice officials to all levels of government, and to protect the right to choose in the legislatures, the courts, and at the clinics. The NARAL Foundation educates the public about reproductive rights issues. NARAL recognizes that guaranteeing women the full range of reproductive choices is

critical to women's autonomy and equality.

THE WOMEN'S LAW PROJECT is a non-profit law firm dedicated to advancing the status and opportunities of women. The Women's Law Project believes that the right to reproductive choice is an essential component of women's ability to play an equal role with men in this society, and has engaged in extensive litigation and public education designed to protect women's legal right to abortion. Since its founding in 1974, the Women's Law Project has challenged in the courts a wide variety of state statutes designed to restrict abortion rights, including the Pennsylvania statute invalidated by this Court in *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986), and as co-counsel in *Planned Parenthood v. Casey*, 112 S. Ct. 2791 (1992).

THE WOMEN'S LEGAL DEFENSE FUND ("WLDF") is a non-profit national advocacy organization formed in 1971 to promote equality and opportunity for women. WLDF works in Congress, the courts, the executive branch, and at the state level to advance public policy for women and their families. One of WLDF's priorities is to make sure that women, particularly low-income women, have access to the full range of reproductive health care services, including safe and legal abortion services, family planning services, and maternal and child health services.

THE NATIONAL WOMEN'S LAW CENTER is a Washington-based legal organization which has been working since 1972 to advance and protect women's legal rights. The Center's primary goal is to ensure that public and private sector practices and policies better reflect the needs and rights of women. The fundamental right to abortion recognized in *Roe v. Wade* is of profound importance to the lives, liberty, health, and safety of women throughout the country. Because of the tremendous significance to women of the freedom to

choose whether to bear children, the National Women's Law Center seeks to preserve women's right to abortion, which can only be assured if there is access to healthcare providers.

THE AMERICAN JEWISH COMMITTEE ("AJC") is a national organization of 40,000 members, founded in 1906, for the purpose of protecting the civil and religious rights of Jews. The AJC believes that this goal can best be accomplished by helping to preserve all of the constitutional rights of all Americans, including the fundamental right of access to abortion on a voluntary basis as set forth in *Roe v. Wade*. It is precisely this fundamental right of access which is at stake in the case at bar.

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No. 93-880

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OCTOBER TERM, 1993

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Respondents.

On Writ of Certiorari to the Supreme Court of Florida

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QUESTION PRESENTED

Whether the First Amendment prohibits state courts from issuing injunctions regulating the time, place and manner of speech-related conduct that has a demonstrably adverse effect on the health and safety of patients at a medical facility and is inimical to the residential privacy interests of health care providers.

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INTEREST OF *AMICI CURIAE*

Amici are national and state organizations of physicians dedicated to promoting the public welfare through the maintenance of the highest professional standards and the provision of quality health care. *Amicus* American College of Obstetricians and Gynecologists (ACOG) is a private, voluntary, nonprofit organization of physicians who specialize in obstetric and gynecologic care. ACOG is the leading group of professionals providing health care to women; its more than 33,000 members represent approximately 90 percent of all obstetricians and gynecologists practicing in the United States. *Amicus* California Medical Association is a nonprofit, incorporated professional association of approximately 32,000 physicians

engaged in the private practice of medicine, in all specialties, in the State of California. *Amicus* American Psychiatric Association, with approximately 40,000 members, is the nation's largest organization of physicians who specialize in psychiatry. *Amicus* American Medical Women's Association is a non-profit organization of 13,000 women physicians and medical students.

Amici have a two-fold interest in this case. First, the injunction at issue in this proceeding regulates conduct that had a demonstrably deleterious effect on the health and welfare of patients at a medical facility; indeed, the enjoined conduct often increased the risks associated with or completely prevented the provision of medical services to patients. Second, *amici* believe that health care providers have a fundamental right to be free in their residences from focused, intimidating and harassing picketing and other forms of coercive protest designed to force them to cease providing legal health care services. Because this case concerns the extent to which courts can regulate conduct that is fundamentally incompatible with patient health and safety and inimical to the privacy interests of health care providers, *amici* wish to present their views.[1]

BACKGROUND

Easily overlooked in the often heated ethical, moral and legal debate surrounding abortion is the fact that it is an invasive medical procedure. When performed correctly by trained and experienced physicians, abortion is relatively safe. Nevertheless, an estimated 5,000 women "suffer a serious complication" from the procedure each year, and "the potential for complications is a major public health concern." Buehler et al., *The Risk of Serious Complications from Induced Abortion: Do Personal Characteristics Make a Difference?*, 153 Am. J. Obstet. Gynec. 14 (1985). Among the most serious com-

[1] Pursuant to Rule 37.3 of the Rules of this Court, the parties have consented to the filing of this brief. The parties' letters of consent have been filed with the Clerk of the Court.

plications are infections necessitating hospitalization, hemorrhage requiring transfusion, uterine perforation, bowel or bladder injury, pulmonary embolism, endotoxic shock, convulsions, cardiac arrest and, in rare circumstances, death.[2]

In the United States, approximately two-thirds of all abortions are performed in stand-alone clinics such as the Aware Woman Center.[3] These clinics are licensed medical facilities, staffed by physicians and other trained medical personnel who, in addition to performing or assisting with the abortion procedure itself, administer general and local anesthesia before the operation and analgesics and other necessary medications after the operation. The medical staff also must recognize and respond to any of the major or minor complications that might arise during or after the procedure. In addition, almost all clinics provide other medical services, most typically contraceptive care to nonabortion patients, general gynecologic care and treatment for sexually transmitted diseases.[4]

1. The Adverse Health and Safety Effects of Protest Activities Outside Abortion Clinics

The injunction at issue in this case proscribes activities that increased the medical risks associated with abortions and otherwise adversely affected the health and safety of patients at the clinic. Most significantly, the protests prevented or deterred some patients from entering the clinic

[2] Cates et al., *The Effect of Delay and Method Choice on the Risk of Abortion Morbidity*, 9 Fam. Plann. Persp. 266, 267 n.+ (1977); Cates et al., *Prevention of Uterine Perforation During Curettage Abortion*, 251 JAMA 2108 (1984). The leading causes of abortion mortality are hemorrhage and anesthesia-related deaths, followed by infection and amniotic fluid embolus. Binkin, *Trends in Induced Legal Abortion Morbidity and Mortality*, 13 Clin. Obstet. Gynec. 83, 90 (1986).

[3] Henshaw, *The Accessibility of Abortion Services in the United States*, 23 Fam. Plann. Persp. 246 (1991).

[4] *Id.* at 247. Many clinics also provide nongynecologic surgery, obstetric care, general medical care, infertility counseling or treatment, HIV testing and female sterilization. *Id.*

on the day of their appointments, thereby forcing these women to reschedule the procedure for a later date. By delaying abortions, protesters placed some patients at greater risk of suffering the types of serious complications described above.

Protesters marching on the 37-foot sidewalk that connects the clinic's two parking lots frequently blocked access to the clinic, either by standing directly in front of cars or by surrounding cars that attempted to enter the lots.[5] In other instances, patients who saw dozens (and, on some days, hundreds) of shouting protesters in front of the clinic did not even attempt to enter and instead simply drove away.[6] As a consequence, a significant number of women were unable to keep their appointments and were forced to undergo abortions later in their pregnancies.[7] Indeed, preventing or delaying scheduled abortions was one of the express purposes of the protests.[8]

As the clinic's physician, Dr. Snydle, explained to the district court, delaying an abortion makes the procedure more difficult and time consuming, and increases the risk of morbidity and mortality. J.A. at 155. It is widely recognized that "[t]he earlier in gestation that a woman has an abortion, the safer it is for her medically. . . . The risk of the procedure and the potential for complications increase with the length of pregnancy." *The Surgeon General's Report: The Public Health Effects of Abortion* 13 (1989). In fact, within the first 12 weeks of pregnancy, "the main risk to a woman who wants an abortion

[5] *See* J.A. at 146-47, 154, 211, 271, 275, 534-35, 545, 552.

[6] *See* J.A. at 590, 603-04.

[7] *See* J.A. at 590, 603-04.

[8] Literature from one of the protest groups explained that "[b]locking access to the entrance of abortion clinics . . . buys time for our sidewalk counselors to talk with the birth mothers. In most instances the clinic is shut for the day." J.A. at 404. Petitioner Martin acknowledged that one of the means of protest to which he subscribed consisted of blockading access to clinics. *Id.* at 396.

results from delay." Cates et al., *The Effect of Delay and Method Choice on the Risk of Abortion Morbidity*, 9 Fam. Plann. Persp. 266, 267 (1977). "[A]dvanced gestational age is recognized as a major risk factor for serious complications following abortion" (Buehler et al., *The Risk of Serious Complications from Induced Abortion: Do Personal Characteristics Make a Difference?*, 153 Am. J. Obstet. Gynec. at 14), and is "associated with an increased risk of abortion mortality." Binkin, *Trends in Induced Legal Abortion Morbidity and Mortality*, 13 Clin. Obstet. Gynec. 83, 85 (1986). Indeed, studies indicate "that *any* delay increases the risk of complications." Cates et al., *The Effect of Delay and Method Choice on the Risk of Abortion Morbidity*, 9 Fam. Plann. Persp. at 268 (emphasis in original). Thus, by turning patients away from the clinic, protesters exposed some women to greater medical risks than they otherwise would have faced.

In addition, the protests adversely affected the health and safety of women who managed to enter the clinic. First, both Dr. Snydle and Captain Allgeyer of the Melbourne Police Department testified that, by blocking the clinic's driveways, protesters on the sidewalk could impede the arrival of emergency medical teams or vehicles. J.A. at 155, 259. In the event of the rare emergency, such as a uterine perforation involving large blood loss, a patient's life would depend on the prompt arrival of emergency vehicles. Although no such emergency occurred during the protests at the Aware Woman Clinic, Dr. Snydle testified that protesters outside another Florida clinic had in fact interfered with the arrival of an ambulance. J.A. at 155. From the standpoint of patient health and safety, of course, this threat of interference is wholly intolerable.

Second, the record reveals (and medical literature confirms) that the types of protest activities that the district court enjoined in this case directly affect the emotional state of many patients, which in turn can complicate and increase the risks associated with the procedure itself. On

protest days, patients arriving at the clinic were met by large numbers of shouting and screaming protesters, many of whom, as previously noted, blocked access to the clinic or approached cars in an effort to force literature upon patients and other occupants.[9] Patients who got through the sidewalk and into the parking lot were confronted by protesters standing on ladders who shouted at them over an eight foot fence.[10] The screams of protesters could be heard clearly from across the street, and were audible inside the building, even over music that the clinic played in an effort to suppress the sound of the shouting.[11] Some protesters specifically directed their shouts towards the surgical suites and recovery area within the clinic.[12] In one instance, a protester standing on a ladder held a sign towards the clinic that identified a man who had accompanied a patient inside.[13]

Such activities are physically and emotionally upsetting to many women undergoing an abortion. Coping with the emotional complexities of an unwanted pregnancy is recognized to be a particularly stressful life event.[14] In addition, many women approach abortion, like any other invasive procedure, with trepidation because it "is a medical procedure which may be uncomfortable or painful." Landy, *Abortion Counselling—A New Component of*

[9] *See, e.g.*, J.A. at 146-47, 534 (blocking or surrounding cars); *id.* at 260, 282, 354, 534, 542, 546, 552, 619 (screaming and shouting).

[10] *See* J.A. at 284, 355, 459-62, 542, 553.

[11] *See* J.A. at 260, 282, 534, 546.

[12] *See* J.A. at 551, 553.

[13] *See* J.A. at 355, 538, 542.

[14] Adler et al., *Psychologic Factors In Abortion*, Am. Psychologist (Oct. 1992), at 1194, 1197; Landy, *Abortion Counselling—A New Component of Medical Care*, 13 Clin. Obstet. Gynec. 33, 36 (1986); Frankel-Fein, *Defense Style, Social Support Appraisal, Response to a Counseling Session, and Stress Perception in Women Undergoing Abortion* 4, 31 (1991); Polk-Walker, *Counseling Implications in a Client's Choice of Anethesia During a First or Repeat Abortion*, 28 Nursing Forum 22 (1993).

Medical Care, 13 Clin. Obstet. Gynec. 33, 38 (1986).[15] Indeed, "most [adult] patients have some degree of state anxiety relating to anesthesia" (Garfield, *Psychologic Problems in Anesthesia*, 10 Am. Fam. Physician 60, 62 (1974)), and even a minor surgical procedure can be "an important problem of emotional stress for many patients." Meyer, *Haemodynamic Changes Under Emotional Stress Following a Minor Surgical Procedure Under Local Anaesthesia*, 16 Int'l J. Oral Maxillofac. Sur. 688, 694 (1987).[16]

For patients already in a state of emotional vulnerability, protests such as those enjoined here can cause extreme distress. On the days protests took place, clinic staff observed that many patients had elevated blood pressure, increased rates of respiration and rapid heartbeats; some women arrived at the clinic in tears, and many appeared to be extremely anxious, fearful or agitated.[17] Many of these patients expressly attributed their distress to the yelling, shouting and harassment outside the clinic; because none had prior histories of hypertension, and because patients who attended the clinic on days without protests did not exhibit such symptoms, the medical staff concluded that the protesters caused these abnormal symptoms.[18] Dr. Snydle testified, moreover, that it was the *manner* of the protests—in particular the yelling and screaming and overt hostility—that, in his medical judgment, accounted for the patients' high levels of anxiety. J.A. at 202-03.

His assessment is corroborated by evidence from other clinics where patients encountering similar protests have

[15] *See also* Handy, *Psychological and Social Aspects of Induced Abortion*, 21 British J. Clin. Psychol. 29, 37 (1982).

[16] This is especially true of teenagers, who lack experience with pelvic examinations and medical procedures generally. Landy, *Abortion Counselling—A New Component of Medical Care*, 13 Clin. Obstet. Gynec. at 38.

[17] *See* J.A. at 147, 150-51, 153, 202-03, 212-13, 264, 585.

[18] *See* J.A. at 150-53, 212-13.

likewise suffered psychophysiological stress. In addition to crying, such patients have "exhibited evidence of adrenergic 'fight-or-flight' reaction such as pallor, shaking, sweating, pupillary dilation, palpitations, hyperventilation, and urinary retention." Hern, *Proxemics: The Application of Theory to Conflict Arising From Antiabortion Demonstrations*, 12 Population & Env't 379, 380 (1991).[19]

These symptoms complicate an abortion and increase its risks. For example, urinary retention makes it difficult or impossible to perform a pelvic examination and determine uterine size or the presence of any co-existing pelvic pathology, both of which are essential in the preoperative evaluation. *Id.* at 380-81. Hyperventilation can lead to uncomfortable sensations, which can heighten anxiety and even lead to loss of consciousness if a vasovagal syndrome occurs. *Id.* Studies of patients that undergo abortions have shown that tension affects the degree of pain experienced and the difficulty of the procedure itself,[20] a finding consistent with other studies of stress and its effects on surgery patients.[21] And if a patient becomes agitated before or during the procedure, "she could easily experience serious complications of the abor-

[19] *See also id.* at 382; *American College of Obstetricians & Gynecologists* v. *Thornburgh*, 613 F. Supp. 656, 663 (E.D. Pa. 1975) (patients who entered clinics during protests "were visibly upset and distressed"); Forrest & Henshaw, *The Harassment of U.S. Abortion Providers*, 19 Fam. Plann. Persp. 9, 13 (1987) (for women who encounter harassing protests, "obtaining an abortion can be a frightening experience").

[20] Kay, *Psychological Preparation for a Potentially Stressful Medical Procedure* 32 (1984) ("high levels of preoperative anxiety in abortion patients are associated with greater pain and discomfort during the abortion procedure, when compared with moderate levels of anxiety").

[21] Levine et al., *Failure Hurts: The Effects of Stress Due to Difficult Tasks and Failure Feedback on Pain Report*, 54 Pain 335, 336 (1993); Manyande et al., *Anxiety and Endocrine Responses to Surgery: Paradoxical Effects of Preoperative Relaxation Training*, 54 Psychosomatic Med. 275, 283 (1992).

tion that would be extremely unlikely under other circumstances." *Id.* at 381.

Consistent with these medical findings, Dr. Snydle testified that patients exhibiting signs of heightened anxiety showed more resistance to analgesics and required higher levels of sedation. J.A. at 153.[22] Increasing the level of sedation in turn increases the risk of the surgery. *Id.*[23] Indeed, Dr. Snydle testified that on several occasions a patient's anxiety-related symptoms were so great that it was necessary to postpone surgery. J.A. at 150-51. A patient whose surgery is deferred, of course, later faces increased risks due to the advanced gestational point at which abortion is perfomed. See *supra* pp. 3-5.

2. Protest Activities Directed at Clinic Staff

The protesters' activities were directed not only at patients but also at the health care providers at the clinic. Protesters blocked Dr. Syndle's car as he tried to enter the clinic and shouted at him over the eight foot fence surrounding the parking lot. J.A. at 146, 454, 460. Another employee, Ruth Arick, testified that protesters shouted over the fence at her that they were praying for her death. J.A. at 555-56.

In addition, protesters conducted demonstrations outside the homes of the clinic's medical staff and owners. Groups of as many as 30 protesters marched in front residences carrying signs and distributing leaflets that

[22] *See also* Polk-Walker, *Counseling Implications in a Client's Choice of Anesthesia During a First or Repeat Abortion*, 28 Nursing Forum 22, 23 (1993) (women who are anxious or fearful choose general anesthesia more frequently than calmer women).

[23] *See* Hern, *Abortion Practice* 35-37 (1984) (general anesthesia is associated with a two to four-fold increase in first-trimester abortion fatalities, and significant increases in uterine perforation, cervical injury, blood transfusions and corrective major surgery); Meyer, *Haemodynamic Changes Under Emotional Stress Following a Minor Surgical Procedure Under Local Anaesthesia*, 16 Int'l J. Oral Maxillofac. Surg. 688 (1987) (noting that, in cases of "[u]nexplained cardiovascular reactions and fatalities" associated with local anaesthesia, "[i]mportant factors are fear, anxiety and stress").

identified clinic employes as murderers (J.A. at 170, 458, 493), shouting at other residents and passing cars (J.A. at 501-02), and knocking on the doors of the homes or apartments. J.A. at 458, 506-07, 512. In one case, 15 protesters approached the residence of Pam Doyle, a clinic nurse, while she was working and her three daughters, ages 15, 11 and nine, were home alone. J.A. at 505-07. The protesters asked the girls to convince their mother to "stop killing babies." J.A. at 507. Not surprisingly, the encounter terrified the children. J.A. at 505-07.

Ms. Doyle testified that she felt trapped in her home during the protests and that she feared for the safety of her children on days when she was at work while they were at home. J.A. at 503-04. She was so upset by the invasion of her privacy that she moved. J.A. at 514. She also ceased working at the clinic for a time. J.A. at 521.

Her reactions to the protests—both those at her home and those at the clinic—were typical of other clinic employees. Dr. Snydle testified that he was frightened and disgusted by the acts of a large group of protesters who accosted him at a hotel where he had spent the night, and by the act of a lone protester who trailed him on the highway and pulled alongside his car to pantomime the act of shooting him. J.A. at 174-79, 190-91.[24] Ruth Arick testified that she felt threatened by protesters' shouts, J.A. at 555-56, and both she and Dr. Snydle testified that they feared the possibility of assassination by a protester swept up in the fervor of the demonstrations. J.A. at 196-99, 599. All three clinic employees who testified, however, stated that they were not frightened by, and did not object to, peaceful picketing and praying outside the clinic.[25]

[24] In addition, Dr. Snydle received threatening mail at his home and was accosted at the clinic itself. J.A. at 170, 185-86.

[25] *See* J.A. at 215 (Dr. Snydle) ("It's when they antagonize and harass and intimidate and cause severe harm to innocent individuals that I object"); *id.* at 517-18 (Pam Doyle) ("Marching and yelling and name calling scares me. . . . The praying doesn't scare me"); *id.* at 596-97 (Ruth Arick) (praying and singing "are not the threatening, menacing activities that the clinics are concerned with . . . . We're concerned about obstruction, about people blocking ingress and egress, . . . and people being threatened, harassed, and intimidated").

A 1988 study found that the "continued harassment of abortion providers and their patients is a problem that no other medical care providers encounter." Henshaw, *The Accessibility of Abortion Services in the United States*, 23 Fam. Plann. Persp. 246, 252 (1991). Studies of clinic personnel have found that employee levels of distress are highly correlated with protest activities at the clinics, with the highest levels of distress typically being reported by those who work at clinics experiencing the most protest activities.[26] Indeed, even health care providers who have not suffered direct attack experience heightened fear when other providers are attacked, and are thus primed to take seriously any implied or overt threats directed at them.[27]

The present case graphically illustrates these effects. Employees such as Ms. Doyle and her children are made to feel trapped and frightened in their own homes, and are forced to relocate, simply because they provide legal medical services. Others are forced to stop providing such services altogether, as was Dr. Snydle, who ceased practicing at the clinic following the murder of a physician outside another Florida clinic. J.A. at 196. These adverse effects on health care providers cannot help but ultimately have a negative effect on patient welfare. In addition to driving experienced physicians such as Dr. Snydle out of the practice, harassment and intimidation discourage younger physicians from entering the field, thereby reducing the availability of abortion services. Grimes, *Clinicians Who Provide Abortions: The Thinning Ranks*, 80 Obstet. & Gynec. 719, 721 (1992).

[26] Halvorson Boyd, *Surviving a Holy War: How Health Care Workers in U.S. Abortion Facilities Are Coping With Antiabortion Harassment* at 72.

[27] *Id.* at 57-58.

SUMMARY OF ARGUMENT

The amended injunction is a content-neutral, reasonable time, place and manner restriction on expressive activity that interferes with the operation of a medical facility.

1. The injunction regulates the manner, not the content, of petitioners' speech. On its face, the injunction does not proscribe any message or idea, nor does it regulate the content of any communication by petitioners. Rather, it extends only to the manner in which petitioners may protest outside of the clinic and the homes of the clinic's employees and owners. Petitioners have chosen methods of communicating their message that are fundamentally incompatible with the nature of a medical facility and private residences. See *NLRB v. Baptist Hosp., Inc.*, 442 U.S. 773, 791 (1979) (Burger, C.J., concurring in judgment); *Frisby v. Schultz*, 487 U.S. 474 (1988). Having engaged in conduct inimical to patient health and safety and residential tranquility, petitioners cannot point to their own message as evidence that the necessary regulation of their conduct is content-based. Further, petitioners' argument that the injunction prohibits expressive activity based on the listener's reaction to the content of the speech ignores uncontradicted evidence in the record that listeners were harmed by the *manner* of petitioners' speech, not its message.

2. The injunction serves a substantial, indeed compelling, government interest in restricting conduct that has a demonstrably harmful effect on the health and welfare of patients at a medical facility. Moreover, by preventing harassing picketing designed to force health service professionals to stop providing legal health care services, the injunction directly promotes vital interests.

3. The nature of the forum and the fact that petitioners' activity is targeted at a captive audience confirm that the injunction serves a compelling government interest. The character of a medical facility raises public health and safety concerns that match or exceed the interests implicated in other contexts—such as those involving schools, courthouses, and public busses—in which this Court has upheld restrictions not only on the manner, but in some cases the content, of speech. Similarly, the captive nature of the audience means that offensive or harmful speech-related conduct may be regulated, inasmuch as patients and doctors are "practically helpless" to avoid petitioners' interference with their substantial health and privacy interests.

4. The injunction is sufficiently tailored to address specific instances of conduct that have had demonstrable adverse consequences on clinic patients and staff. It does not prohibit more conduct than necessary, but rather applies only to identifiable, well-documented abuses that have occurred at the clinic and the homes of clinic personnel. For these same reasons, the injunction is not impermissibly overbroad.

ARGUMENT

I. THE INJUNCTION IS A CONTENT NEUTRAL, VALID TIME, PLACE AND MANNER RESTRICTION ON PETITIONERS' SPEECH.

The First Amendment reflects a national commitment to uninhibited, robust and wide open debate. *Boos v. Barry*, 485 U.S. 312, 318 (1988). It does not, however, guarantee the right to communicate one's views at all times and places or in any manner. *Frisby v. Schultz*, 487 U.S. 474, 479 (1988); *City Council v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984); *Heffron v. International Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 647 (1981). The government may regulate the time, place and manner of expressive conduct or speech when it does so on a content-neutral basis and by restrictions that are adequately tailored to serve a significant government interest and that leave open ample alternative means of communication. *Burson v. Freeman*, 112 S. Ct. 1846, 1850 (1992); *United States v. Albertini*, 472 U.S. 675, 689 (1985). The injunction at issue in this case is an appropriate, time, place and manner restriction that bal-

ances the free speech interests of extraordinarily hostile abortion protesters against the health and safety interests of patients at a medical facility and the privacy interests of medical personnel in their homes. Moreover, even if the injunction were content-based—and it plainly is not—the injunction would still be constitutionally permissible in light of the compelling governmental health, safety and privacy interests it serves and its narrowly drawn prohibitions.

A. The Injunction Regulates the Manner, Not the Content, of Petitioners' Speech.

On its face, the injunction does not proscribe any message or idea, nor does it regulate the content of any communication around the clinic or the residences of the clinic's staff. To the contrary, the injunction regulates, and in some areas proscribes, *conduct* or *acts*, such as shouting, singing, chanting, whistling, yelling or using sound amplification devices during surgical procedures (J.A. at 59), or physically abusing, grabbing, intimidating, or harassing persons entering or leaving the clinic. *Id.*; see also J.A. at 60 (referring to "prohibited *acts* listed herein") (emphasis added). Each of the injunction's prohibitions is based on factual findings that the proscribed conduct interfered with or increased the medical risks of procedures performed at the clinic, or improperly invaded the privacy interests of clinic staff in their residences.

Thus, for example, the 36-foot buffer zone around the clinic (Paragraphs One through Three of the injunction) ensures that patients, who, despite an earlier injunction, had been prevented or deterred from entering the clinic by congregations of protesters (see *supra* pp. 3-4), are able to keep scheduled appointments. Accordingly, this buffer zone ensures that women who obtain abortions will do so at an earlier (and safer) stage of their pregnancies. Paragraph Four shields patients *inside* the clinic from noises and signs that in the past upset them or made them anxious, thereby increasing the medical risks of their

surgeries. See *supra* p. 6. Paragraphs Five and Seven protect women entering or leaving the clinic from physical contact with, or uncomfortably close proximity to, protesters whose frequently aggressive and hostile shouting had, in many cases, had a demonstrably adverse effect on the health and safety of patients. See *supra* p. 7. Paragraph Five's 300-foot buffer zone likewise prevents protesters from shadowing or stalking p. ents—an activity plainly at odds with the well-being of patients.

Similarly, Paragraphs Six and Eight prohibit the targeted picketing of the homes of employees of the clinic,[28] and the harassment, intimidation, physical abuse, assault and threatening of clinic staff.[29] Ample evidence revealed that these protest activities have driven health care providers, such as Dr. Snydle, from the field, may discourage new physicians from entering the field, and are inimical to the privacy interest that physicians and nurses, like all citizens, enjoy within their own homes.[30] See *infra* p. 11; see also *Frisby v. Schultz*, 487 U.S. 474 (1988).

Notwithstanding the detailed findings of the district court, petitioners claim that the injunction is content-based because it applies to Operation Rescue and petitioners, pro-life advocates, and "all persons acting in concert or participation with them." This crabbed argument: (i) wholly fails to address the actual content-neutral language of the injunction; (ii) does no more than restate the fact that an injunction rather than an ordinance is the subject of this proceeding; and (iii) trivializes the profound adverse medical consequences of petitioners' conduct.

Common sense dictates that the starting point for determining whether a restriction is content-based is the language of the restriction itself. See *City Council v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984). A

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[28] *See* J.A. at 59.

[29] *See* J.A. at 60.

[30] *See* J.A. at 56.

restriction that "singles out speech of a particular content," *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976), or that requires for its application an "examin[ation of] the content of the message that is conveyed," *Forsyth County v. Nationalist Movement*, 112 S. Ct. 2395, 2403 (1992), is content-based. As described above, however, the injunction at issue here regulates the *manner* in which petitioners may communicate their views. It does not prohibit any message or limit only "pro-life" expressive conduct by petitioners. Instead, the injunction limits all expressive conduct that the district court properly found to have adverse medical consequences on the patients of the clinic. The fact that the organizations and individuals who have engaged in conduct that is fundamentally incompatible with the purpose of a medical facility happen to advocate a particular point of view about abortion does not, by itself, transform necessary and content-neutral prohibitions on conduct into content-based discrimination against speech.

Not only is the injunction facially content-neutral, it is unquestionably justified by a legitimate governmental interest rather than disagreement with the content of the regulated speech. See *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984), and cases cited therein. As this Court has explained

> The principle inquiry in determining content neutrality . . . is whether the government has adopted a regulation of speech because of disagreement with the message it conveys. The government's purpose is the controlling consideration. A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on *some speakers or messages* but not others.

Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (emphasis supplied) (citation omitted).

It is clear that the injunction was created to serve the legitimate—indeed compelling—interests in (1) securing

safe and effective medical care for patients undergoing a surgical procedure and (2) maintaining residential privacy. The district court based each of the restrictions on findings, which were amply supported by the record, that the interference with access to the clinic, the noises associated with the demonstrations and the uninvited contacts, shadowing and stalking by protesters impermissibly interfered with the operations of the clinic and the physical and emotional well-being of its patients.[31] There is absolutely no basis for suggesting that these well-documented —and medically sound—findings were pretextual or that the district court believed the protesters' speech should be censured. See J.A. at 56 ("The rights of the [protesters] to demonstrate, speak and make known their views should be recognized and protected").

In contending otherwise, petitioners seize upon the "in concert" language typically present in any injunction and argue that, as a consequence of this limitation, the injunction is content-based. Pet. Br. at 11-13. This argument proves too much. The "in concert" language merely reflects (i) the limits of the district court's jurisdiction and (ii) the fact that it was the parties before the court (and persons acting in concert with them) who were the source of the substantive evils that the court properly sought to regulate. An injunction is not content-based simply because the persons who have caused the health and safety concerns necessitating the injunction in the first place all advocate the same point of view and act to promote that goal. *Cf. Clark v. Community for Creative Non-Violence*, 468 U.S. at 297; *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 49-50 n.9 (1983).

Taking petitioners' argument to its logical conclusion, moreover, would require that any injunction touching on speech or expressive conduct, however indirectly, must satisfy a stricter standard of review than an identical law of general application, despite the fact that a law of

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[31] *See* J.A. at 55-56.

general application presents a concomitantly broader danger of chilling protected speech.[32] The intent to convey a pro-life message is not a necessary element of a violation of the injunction; nor does one violate the injunction by conveying the most strident views on abortion, as long as the message is conveyed in a manner that does not contravene the terms of the injunction. *Barnes v. Glen Theatre, Inc.*, 111 S. Ct. 2456, 2464 (1991) (Scalia, J., concurring in judgment). Indeed, under the injunction, a protester standing outside the 36-foot buffer zone can hold a sign visible to those driving up to the clinic that contains any message, no matter how provocative or graphic, expressing his or her views about abortion.

Petitioners also argue that the injunction is content-based because it is necessary, they claim, to examine the content of an "image observable" inside the clinic in order to determine if the bearer of the image is acting "in concert" with Operation Rescue. Petitioners do not explain why the "in concert" determination is any different when applied to this one element of Paragraph

[32] Indeed, petitioners' theory would lead to absurd results. For example, in *Frisby v. Schultz*, 487 U.S. 474 (1988), this Court upheld an ordinance banning picketing targeted at individual residences. The ordinance was passed in direct response to picketing by pro-life protesters that had generated numerous complaints. *Id.* at 476. Under petitioners' theory, if a court were to enjoin those same picketers to prevent imminent violations of the ordinance, it would have to satisfy a stricter standard of review. This would be true even if the injunction merely recited the terms of the statute and enjoined only individuals who had made clear their intent to violate it. In effect, petitioners' theory would create a system where a statute that is content-neutral is transformed into a content-based restriction merely upon enforcement.

Similarly, in *Boos v. Barry*, 485 U.S. 312 (1988), this Court held that a statute prohibiting congregating within 500 feet of an embassy was a valid time, place and manner restriction on protected speech. *Id.* at 331-32. The statute in *Boos* contains striking similarities to the injunction at issue here, including the use of a "buffer zone" and a site-specific ban on expressive conduct. Under petitioners' theory, the mere use of an injunction to prevent imminent violations of the anti-congregation statute would immediately transform it into a content-based regulation.

Four of the injunction than when applied to any other provision. In fact, petitioners' necessary concession that persons who block access to the clinic (in violation of Paragraphs One and Two) can properly be presumed to be acting in concert with the named defendants (Pet. Br. at 27) is equally applicable to this prohibition. Indeed, it is perfectly logical to assume that a person who brings a ladder to the clinic and stands atop it waving a sign (which is the only way signs can be seen over the clinic's eight-foot fence) is acting in concert with the named defendants to disrupt the clinic's operations.[33]

Precisely because the injunction regulates or prohibits such overt and generally hostile *conduct* (*e.g.*, yelling, shouting, grabbing, intimidating), there is simply no merit to petitioners' related contention that the injunction is content-based because it permits police to enforce the injunction against individuals unconnected with Operation Rescue based solely on the fact that such individuals advocate a similar point of view. As petitioners' own concession makes clear, it is exceedingly unlikely that persons engaging in the proscribed overt and hostile conduct outside the clinic are not acting in concert with the named defendants.[34] In all events, however, it is clear that the injunction can have no effect on individuals, including persons with pro-life views, who are not engaged in active participation with Operation Rescue and petitioners and who have not received actual notice of the injunction. See *Regal Knitwear Co. v. NLRB*, 324 U.S. 9, 14 (1945). Indeed, Fed. R. Civ. P. 65(d) itself establishes the proper scope of the injunction: "Every order grant-

[33] There is simply no support in the record for petitioners' claim that the same methods of expression, with similarly adverse effects on patient health and safety, would not or could not be enjoined if these methods were used in support of a different point of view.

[34] Petitioners assert that individuals outside of the scope of Rule 65(d) were arrested for violating the injunction. To the extent Jane Doe #6 or Mr. Quintero claimed not to be acting "in concert," credibility determinations are the proper function of the trial court.

ing an injunction . . . is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order. . . ." Florida Rule of Civil Procedure 1.160(c) mirrors the federal rule.

Finally, petitioners assert that the injunction is content-based because it prohibits certain expressive activity based upon the listener's reaction to the content of the speech. This argument simply ignores the record in this case, which is replete with evidence that listeners were emotionally and physically upset by the loud, threatening, hostile and intimidating *manner* of speech. See, *e.g.*, J.A. at 153 (testimony of Dr. Snydle) ("I believe that [the physical symptoms of anxiety exist] because of the protesters around the clinic yelling and screaming"). The injunction is thus no more based on the reaction of listeners to the protesters' *message* than was the statute at issue in *Frisby v. Schultz*, which this Court upheld as a content-neutral restriction despite the fact that the ban on peaceful picketing of targeted residences had been enacted as a direct result of complaints about actions by pro-life advocates. 487 U.S. at 482.

B. The Injunction Serves Compelling Government Interests.

Content-neutral time, place and manner restrictions, such as those involved here, must serve a significant government interest. *Burson v. Freeman*, 112 S. Ct. 1846, 1850 (1992). Even content-based restrictions, however, are permissible if they serve a compelling government interest and they are narrowly drawn to achieve that end. *Boos v. Barry*, 485 U.S. 312, 321 (1988). Although the latter restrictions are subject to a higher standard of scrutiny than content-neutral restrictions, in both cases this Court examines the justification for the regulation and the fit between that justification and scope of the regulation. Compare *Burson v. Freeman*, 112 S. Ct. at 1855-57, with *Frisby v. Schultz*, 487 U.S. 474, 484-88 (1988). *Amici* submit that, regardless of which standard of scru-

tiny is applied here, the amended injunction passes constituitonal muster. The injunction plainly serves compelling government interests in ensuring the safe and effective provision of medical treatment and preserving the residential privacy rights of health care providers, and the injunction is carefully tailored to prevent concrete, well-documented threats to those interests.

First, this Court has repeatedly focused on the nature of the forum at or near which expressive activity is taking place when evaluating the constitutional propriety of speech-related regulations. See *United States v. Kokinda*, 497 U.S. 720, 732 (1990) (post office); *Lehman v. City of Shaker Heights*, 418 U.S. 298, 302-03 (1974) (public bus); *Grayned v. City of Rockford*, 408 U.S. 104, 116 (1972) (school); *Tinker v. Des Moines Sch. Dist.*, 393 U.S. 503, 506 (1969) (school); *Adderley v. Florida*, 385 U.S. 39, 47 (1966) (jail); *Cox v. Louisiana*, 379 U.S. 559, 562 (1965) (courthouse). "The nature of a place, 'the pattern of its normal activities, dictate the kinds of regulations of time, place, and manner that are reasonable.' . . . The crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time." *Grayned*, 408 U.S. at 116 (quoting Wright, *The Constitution on the Campus*, 22 Vand. L. Rev. 1027, 1042 (1969)). That the activities in question are conducted in the traditional public forum of a public sidewalk is by no means dispositive.[35]

Amici submit that the nature of a medical facility raises public health and safety concerns that match or exceed the interests implicated in the public school, military base, courthouse, or public bus settings. See *NLRB v. Baptist Hosp., Inc.*, 442 U.S. 773, 781-85 (1979);

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[35] This Court has upheld restrictions on expressive conduct on sidewalks that is incompatible with the normal activity of a particular place adjacent to the sidewalk. *See Frisby*, 487 U.S. at 480-81; *Burson v. Freeman*, 112 S. Ct. 1846, 1850 (1992); *Grayned v. City of Rockford*, 408 U.S. 104, 115-17 (1972).

Beth Israel Hosp. v. NLRB, 437 U.S. 483, 509 (1978) (Blackmun, J., concurring in judgment); *Dallas County Hosp. Dist. v. Dallas Ass'n of Community Orgs. for Reform Now*, 459 U.S. 1052 (1982) (Rehnquist, C.J., dissenting from denial of certiorari). Conduct that interferes with the safe and effective provision of medical services is fundamentally incompatible with the nature and function of a medical facility. See *NLRB v. Baptist Hosp., Inc.*, 442 U.S. at 791 (Burger, C.J., concurring in judgment) ("I would think no 'evidence' is needed to establish the proposition that the primary mission of every hospital is care and concern for the patients and that anything which tends to interfere with that objective cannot be tolerated"). Plainly, the government has a compelling interest in seeing that any medical procedure is performed under circumstances that insure maximum safety for the patient, including abortions. *Roe v. Wade*, 410 U.S. 113, 150 (1973). Restricting the time, place or manner of speech-related activity to prevent harmful interference with medical procedures directly serves that very compelling government interest. See *Bigelow v. Virginia*, 421 U.S. 809, 827 (1975). Indeed, this Court has indicated that restrictions on *speech* are appropriate in the hospital setting:

> [T]he [] decision to limit car card space to innocuous and less controversial commercial and service oriented advertising does not rise to the dignity of a First Amendment violation. Were we to hold to the contrary, display cases in public hospitals . . . would immediately become Hyde Parks open to every would-be pamphleteer and politician. This the Constitution does not require.

Lehman v. City of Shaker Heights, 418 U.S. 298, 304 (1974); see also *Dallas County Hosp. Dist. v. Dallas Ass'n of Community Orgs. for Reform Now*, 459 U.S. 1052 (1982) (Rehnquist, C.J., dissenting from denial of certiorari).

Contrary to petitioners' assertion, the compelling government interests at stake here extend far beyond that of ensuring that women are not "actually prevented from obtaining abortions." Pet. Br. at 17. The injunction prevents the increased medical risks and complications to which petitioners' conduct gave rise, and protects the safe and effective provision of all other obstetric or gynecological services offered at the clinic. Petitioners nowhere address the tangible adverse medical impacts of their actions, including the psychophysiological symptoms of distress that those actions caused in patients. Instead they characterize this case as presenting a tension between an infringement of their right to engage in speech-related activity and a potential infringement of a woman's right to obtain an abortion. Pet. Br. at 16-17. In so doing, they blind themselves to the constitutional issue actually posed by their harmful actions.

Furthermore, the injunction serves a compelling government interest in protecting residential privacy. The record reflects that protesters, among other things, approached the homes of staff and made threatening comments to unattended children of clinic employees. See *supra* p. 10. "The State's interest in protecting the well-being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society." *Carey v. Brown*, 447 U.S. 455, 471 (1980). "There is simply no right to force speech into the home of an unwilling listener." *Frisby*, 487 U.S. at 485. Indeed, speech targeted at the home and designed to coerce rather than to disseminate a message to the general public is an "evil" that is subject to restriction. See *id.* at 487.

Second, the compelling nature of the government interest is revealed by the captive nature of the audience involved. While ordinarily, speech or conduct will not be restricted because it is offensive to the listener, when those listeners are a captive audience, reasonable restrictions on the place and manner of offensive or coercive speech is appropriate. Thus, in *Lehman v. City of Shaker*

Heights, a *content-based* ban on political advertising in the public transit system was upheld because:

> "[t]he streetcar audience is a captive audience. It is there as a matter of necessity, not of choice." *Public Utilities Comm. v. Pollak*, 343 U.S. 451, 468 (1952) (Douglas, J., dissenting) In such situations, "[the] legislature may recognize degrees of evil and adapt its legislation accordingly." *Packer Corp. v. Utah*, 285 U.S. 105, 110 (1932).

418 U.S. at 302. Bans on targeted picketing and the use of sound trucks in residential neighborhoods and on indecent language over the radio waves have been upheld based upon the effect on the listener. *Frisby*, 487 U.S. at 484-85; *FCC v. Pacifica Found.*, 438 U.S. 726, 748-49 (1978); *Kovacs v. Cooper*, 336 U.S. 77, 86-87 (1949). In all of these cases, bans on offensive conduct and even speech were permitted because the means of communication and the content of the speech itself invaded substantial privacy interests in an essentially intolerable manner. See *Cohen v. California*, 403 U.S. 15, 21 (1971).

Individuals seeking medical attention are a classic captive audience. An individual seeking or requiring care at a medical facility that provides reproductive health services, whether an abortion or any other service, is "practically helpless to escape th[e] interference with his [or her] privacy," *Kovacs*, 336 U.S. at 87, that results from conduct such as petitioners'.[36] In addition to being captive, persons seeking medical care, particularly medical care relating to reproductive matters, have a compelling interest in privacy and anonymity.[37] Such captive

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[36] This is particularly true in the case of abortion, which is not a widely offered procedure. Henshaw, *The Accessibility of Abortion Services in the United States*, 23 Fam. Plann. Persp. 246, 252 (1991). Indeed, nearly ten percent of women who obtain abortions must travel more than 100 miles to do so. *Id.*

[37] The record indicates that the injunction responded, in part, to activities of protesters who traced patients' license plates in order to contact them after treatment or "stalked" clinic patients and staff. *See* J.A. at 55, 170, 458, 493, 501-12. *Cf. Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 766 (1986) (invalidating reporting requirements because they "raise[d] the specter of public exposure and harassment of women who choose to exercise their personal, intensely private, right, with their physician, to end a pregnancy"); *Bellotti v. Baird*, 443 U.S. 622, 655 (1979) ("[i]t is inherent in the right to make the abortion decision that the right may be exercised without public scrutiny and in defiance of the contrary opinion of the sovereign or other third parties") (Stevens, J., concurring in judgment).

patients cannot simply avert their eyes, close their ears, or avoid needed medical services altogether in order to avoid the documented adverse medical consequences and invasion of medical privacy that conduct such as petitioners' causes. When expressive conduct crosses the line from being offensive to being harmful to persons helpless to avoid it, injunctive relief is constitutionally permissible. *See id.; Milk Wagon Drivers Union v. Meadowmoor Dairies*, 312 U.S. 287, 293 (1941).

C. The Injunction Is Narrowly Tailored to Protect the Government Interests at Stake and Leaves Open Ample Alternative Means of Communication.

Content-neutral time, place and manner restrictions, such as the injunction at issue here, must be reasonably tailored to serve a significant governmental interest. *Burson v. Freeman*, 112 S. Ct. 1846, 1850 (1992).[38] Content-based restrictions must be necessary to serve a compelling state interest and be narrowly drawn to achieve that end. *Id.* at 1851. *Amici* believe that the amended injunction satisfies both standards.

The injunction at issue here replaced a more limited injunction that prohibited only blocking entry into the clinic and the physical abuse of individuals seeking care

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[38] The requirement that time, place and manner restrictions be narrowly tailored is satisfied "so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation." *United States v. Albertini*, 472 U.S. 675, 689 (1985).

at the clinic.[39] When the original injunction failed to prevent interference with the operation of the clinic, the district court carefully and precisely expanded the injunction. Given this procedural history, petitioners' assertion that the original injunction is a more appropriate, narrowly tailored restriction is entirely untenable. Rather, the first injunction's failure to protect patient health and safety and residential privacy demonstrates that the proposed alternative did not achieve the State's goal.

Each provision of the amended injunction is tailored to permit the clinic to function safely and effectively while allowing petitioners alternative avenues of expression. Under Paragraph Three's buffer zone,[40] petitioners are permitted within 5 feet of the clinic on the east property line and may "congregate, demonstrate and freely express themselves outside the Clinic buffer zone subject to the noise limitations on the days of surgical procedures."[41] Creating a site-specific limited ban on expressive activity demonstrates that the restriction is narrowly tailored. See *Boos v. Barry*, 485 U.S. 312, 331 (1988) (site-specific prohibition of congregating within 500 feet of a foreign embassy upheld); *Grayned*, 408 U.S. at 120 ("expressive conduct may be constitutionally protected at other places or other times, but next to a school, while classes are in session, it may be prohibited"); *Milk Wagon Drivers Union*, 312 U.S. at 298 ("The injunction is confined to conduct near stores dealing in respondent's milk . . . . An injunction so adjusted to a particular situation is in accord with the settled practice of equity").

Paragraph Four prohibits "singing, chanting, whistling, shouting, yelling, use of bullhorns, auto horns, sound amplification equipment or other sounds or images observable to or within earshot of the patients inside the Clinic."[42] The provision applies, however, *only* during the hours of surgical procedures and recovery periods. This time limitation and the requirement that noises and images be audible or visible *inside* the clinic further demonstrate that this provision is narrowly tailored to address specific, well-documented "interfere[nce] with the operation of the Clinic and the well-being of its patients,"[43] and thus that it does not prohibit more speech-related activity than is necessary to prevent the interference. *Cf. Grayned*, 408 U.S. at 120.[44]

The 300-foot zone in which clinic patients may avoid "sidewalk counseling," found in Paragraph Five, also is narrowly tailored to address a specific harm. As the record reflects, "sidewalk counseling" all too often consisted of confronting patients, shouting and screaming at them, and attempting to force literature on them.[45] The 300-foot buffer zone is a site-specific response to the well-documented adverse medical effects of this behavior. See *Boos v. Barry*, 485 U.S. at 331. It is narrowly tailored

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[39] *See* J.A. at 9.

[40] Petitioners themselves concede that Paragraphs One and Two of the injunction are appropriately tailored. *See* Pet. Br. at 19.

[41] *See* J.A. at 57-58, 62.

[42] *See* J.A. at 59.

[43] *See* J.A. at 55; *see also* J.A. at 150-53, 212-13.

[44] Petitioners assert that various words or phrases, including "in concert," "intimidating," and "sounds or images observable to or within earshot of the patients inside the Clinic" are impermissibly vague. Pet. Br. at 31-37. But the injunction is tailored to address specific, readily-identifiable types of abusive and coercive conduct. Protesters who scale fences to shout at surgical suites and recovery rooms or to scream at clinic patients in a parking lot, or who shout loudly enough to be heard inside a building from across a public street, can hardly claim to lack notice concerning the types of conduct that the injunction proscribes. "It will always be true that the fertile legal 'imagination can conjure up hypothetical cases in which the meaning of [disputed] terms will be in nice question.'" *Grayned*, 408 U.S. at 112 n.15 (quoting *American Communication Assn. v. Douds*, 339 U.S. 382, 412 (1950). The district court's detailed factual findings demonstrate, however, that petitioners' conduct raises no such legal niceties.

[45] *See infra* p. 7.

both to permit patients to enter and leave the clinic free of unwanted confrontation and to minimize the prospects that patients will be trailed after they leave the clinic. See *Burson v. Freeman*, 112 S. Ct. 1846, 1857 (1992) (whether or not a smaller "buffer zone" could be created does not present a question of constitutional dimension; rather it represents a difference in degree only, not a less restrictive alternative in kind). Furthermore, protesters are free to speak with patients that approach them first. Similarly, Paragraph Seven, which forbids "physically abusing, grabbing, intimidating, harassing, touching, pushing, shoving, crowding or assaulting" clinic patients and employees is carefully tailored to prevent adverse reactions in patients and health care providers.

Paragraph Six of the injunction creates a 300-foot buffer zone around the homes of clinic employees. The buffer zone is a narrowly tailored response to an "especially offensive" invasion of privacy (*Frisby*, 487 U.S. at 486) that protects residential tranquility while permitting protesters to disseminate their views in residential areas.[46]

Each element of the injunction is carefully crafted to address a specific evil and no more. No acts that may be peaceful in isolation are prohibited unless they have coercive effects in conjunction with other activities. No individuals were enjoined that were not participants in Operation Rescue or in active concert with it. Petitioners' assertion that Paragraphs Three through Nine of the injunction regulate in a manner that does not advance legitimate state goals, defined by petitioners as limited to securing entrance to a clinic (Pet. Br. at 23), is belied by the record.

Moreover, the injunction permits ample alternative methods by which petitioners can disseminate their message to both the public at large and to individuals seeking care from the covered facilities. First, petitioners are not prohibited from remaining on the shoulder of U.S. 1,

[46] *See infra* pp. 12-13.

five feet from the east boundary of the clinic, or beyond 36 feet of the property lines of the clinic. They can picket and conduct peaceful protests or leafletting from these areas to anyone not trying to secure service from the clinic, or from clinic patients that approach them first. Thus, petitioners are not clearly enjoined from all pro-life advocacy within the buffer zones established by the injunction.

Second, petitioners are free to conduct any expressive activity they desire, whenever they wish, and wherever they wish, outside of the spatial boundaries established in the injunction. As in the school setting, where "expressive conduct may be constitutionally protected at other places or other times, but next to a school, while classes are in session, it may be prohibited," *Grayned*, 408 U.S. at 120, expressive conduct next to a medical facility that interferes with the provision of medical services and impairs the health of patients should be restricted.[47]

II. THE INJUNCTION IS NOT OVERBROAD.

Petitioners argue that the injunction is overbroad because it applies to those acting in concert with Operation Rescue and because it prohibits more conduct than "necessary." In effect, petitioners merely restate their assertion that the injunction is not narrowly tailored. If the "in concert" language present in any injunction were sufficient to create an overbreadth problem, every injunction would fall when confronted with a facial challenge. This obviously is not the law. See *Milk Wagon Drivers Union*, 312 U.S. 287. In fact, by issuing an injunction only against named individuals and those in active concert with them, the district court *narrowed* the reach of the restriction, and lessened the danger of chilling unobjec-

[47] Petitioners assert that the injunction is an invalid prior restraint on speech. This argument ignores the fact that the injuncion is a time, place and manner restriction on activities which interfere with the operations of the clinic. Time, place and manner restrictions are excepted from the rules governing prior restraints. *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 555 (1975).

tionable expressive conduct. See *New York v. Ferber*, 458 U.S. 747, 772 (1982).

Similarly unpersuasive is petitioners' contention that the injunction prohibits more conduct than necessary. Neighboring property owners who are not acting in concert with Operation Rescue may act as they please. See Pet. Br. at 28. Petitioners' contention that innocent, pro-life persons in their own homes or across town will be held in contempt for violating the injunction is purely fanciful. The injunction does not reach pro-life literature, signs, or posters carried by or kept in the homes of individuals (Pet. Br. at 28) because these items are incapable of being perceived through the eight-foot fence surrounding the clinic and the clinic walls.

Those enjoined have chosen particular means of communication, for instance, physically blocking entrances and parking lots, using invasive and coercive techniques when face to face with clinic patients, using sound to interfere with operations inside the clinic, and jamming phone lines. None of this conduct bears "a necessary relationship to speech." *Kovacs v. Cooper*, 336 U.S. at 88 & n.13. Tailored as the injunction is to prevent particular tactics that have adverse medical consequences, the injunction's sweep is constitutionally permissible. See *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973).

CONCLUSION

The judgment of the Supreme Court of Florida should be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1993

JUDY MADSEN,

Petitioner,

v.

WOMEN'S HEALTH CENTER,

Respondent.

On Writ of Certiorari to the Supreme Court of Florida

BRIEF OF THE STATES OF FLORIDA, ARIZONA, COLORADO, CONNECTICUT, HAWAII, ILLINOIS, INDIANA, MAINE, MARYLAND, MASSACHUSETTS, MINNESOTA, MONTANA, NEVADA, NEW JERSEY, NEW MEXICO, NEW YORK, NORTH CAROLINA, OHIO, OREGON, RHODE ISLAND, TENNESSEE, TEXAS, VERMONT, WEST VIRGINIA AND WISCONSIN AS AMICI CURIAE IN SUPPORT OF RESPONDENT

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INTEREST OF THE AMICI CURIAE

The *amici* states seek this Court's affirmance of the ruling of the Florida Supreme Court in this case, upholding the amended permanent injunction entered by the trial court on April 8, 1993. This case presents an important vehicle for this Court to uphold the well-established role of state courts to fashion appropriate injunctive relief to deal with specific controversies and threats to public order and safety in their jurisdiction. This court's decision will directly affect the states' ability to avoid disruption of legitimate public services and activities that occur at particular sites, such as medical facilities, voting booths, schools and courts. Resolution of the issues presented will also affect the ability of state governments to promote public health by ensuring citizens access to health care, to ensure public safety by maintaining the free flow of traffic on public streets and sidewalks, to protect the property rights of state citizens, and to protect the state and federal constitutional rights of all state citizens, including a woman's freedom to seek lawful medical or counseling services in connection with pregnancy.

The *amici* states strongly urge this Court to uphold the trial court's measured response in the instant matter, which recognized not only petitioners' constitutional rights, but the significant state interests involved.

STATEMENT OF THE CASE

The April 8, 1993 injunction challenged by petitioners was the third injunction entered by the state trial court in Melbourne, Florida in a suit brought in October 1991 by the Aware Woman Center for Choice (hereinafter "clinic") seeking relief from the activities of petitioners and others who were blocking clinic access and threatening clinic staff and patients as part of a plan to force the closure of clinics performing abortions in the Central Florida area. Each of these remedies was issued only after the court reviewed evidence and made

detailed findings of fact supporting the necessity for the particular relief granted. As the April 8, 1993 injunction itself states, it was issued in response to the refusal of petitioners to abide by the terms of the previous injunction and in response to escalating illegal and threatening actions by petitioners and their associates at the clinic and at the homes of clinic staff and patients.

The First Permanent Injunction

The clinic filed suit in state court October 24, 1991, seeking immediate relief from the activities of petitioners and their associates who were blocking clinic access as part of an announced plan to close abortion clinics in Central Florida. Finding that the situation required prompt relief, the trial court entered a temporary injunction on October 25, 1991. Petitioners moved to dissolve that order and the clinic requested permanent relief. Based on stipulated facts and affidavits submitted by the parties, the trial court entered a permanent injunction on September 30, 1992. J.A. 1.

Petitioners did not then and do not now challenge the findings of fact or prohibitions imposed by the September 1992 injunction. Pet. at 5, n.4. The trial court found that Madsen, Martin and Hobbs are members of Operation Rescue and Operation Rescue America, J.A. 6, and that they had stated an intent to close clinics performing abortions in Central Florida by blocking access in intentional violation of state law. J.A. 5-7, ¶ 2, 5, 7, 8.[1] The court ruled that state criminal prosecution would not adequately protect the civil and property rights of the clinic, its staff, and its patients, J.A. 7-9, and that

[1] The parties' stipulation, submitted July 30, 1992, states, among other things, that "Ed Martin, Judy Madsen and Shirley Hobbs are members of Operation Rescue America," and that "[r]espondents have passed out flyers in the [Melbourne] area stating their desire to close down abortion clinics in this area . . . ." Pet. App. A 2-3, n.2.

an injunction was both necessary and appropriate. *Id.* The court prohibited petitioners from blocking access to clinics or physically abusing persons entering or leaving the clinics, and from directing others to do so. J.A. 7-10. Petitioners do not challenge those conclusions of law or those prohibitions, which are also contained in the amended permanent injunction at issue. Pet'rs Br. at 27 n.19, 28-30.[2]

The Amended Permanent Injunction

On March 22, 1993, the clinic moved to present additional evidence and to modify the injunction, arguing that the September 30, 1992 injunction had not proved sufficient and that petitioners were violating its proscriptions. J.A. 11-49. The clinic alleged that the petitioners' actions had become more menacing since the murder of Dr. David Gunn near an abortion clinic by an anti-abortion activist in Pensacola, Florida on March 11, 1993. J.A. 11-12.[3] The trial court held a three-day evidentiary hearing at which clinic medical staff, local police, and petitioner Martin, among others, testified. As set out below, the testimony of the clinic staff and police established that after the September 30, 1992 injunction, petitioners Martin and Hobbs and other demonstrators organized by Rescue America, had blocked access to the clinic

[2] Despite paragraphs two and four of petitioners' July 30, 1992 stipulation, and paragraphs two and four of the fact findings in the September 30, 1992, order entered against petitioners, petitioners represent to this Court that they are not associated with Operation Rescue. Pet'rs Br. at 3. In light of the *res judicata* effect of the September 30, 1992, order to which these individuals were party, this Court should summarily reject petitioners' assertions that they are not "in concert with" Operation Rescue or its successor, Operation Rescue America.

[3] The alleged new threats included blockading clinic doctors in their homes and tracing patients' license plates through the Department of Motor Vehicles to obtain their home addresses and contact them. J.A. 14, 15.

and otherwise harassed and threatened clinic staff and patients. The trial court entered detailed findings of fact describing the unlawful actions of petitioners and their associates.

Dr. Frank Snydle, who worked at the clinic until the activities of the protestors caused him to terminate his employment, testified that after issuance of the September 30, 1992 injunction, he had seen petitioners Martin and Hobbs, along with other protestors, trying to stop cars from entering the parking lot of the clinic, yelling at patients and medical staff, and attempting to push literature through closed windows of cars. J.A. 145-147, J.A. 192-194. Dr. Snydle recounted that after running this gauntlet, several patients exhibited physical manifestations of anxiety, including hypertension, cardiac arrhythmia, increased respiration, and fear. Dr. Snydle stated that he regularly had to turn away abortion patients because of the surgical risk occasioned by these symptoms of anxiety, which in his medical opinion, were caused by the protestors. He witnessed some patients being turned away from the clinic by the protesters' blockading, screaming and other harassing conduct, and he stated that the risk associated with surgical procedures increased with delay. Dr. Snydle noted that the protestors' blockage would make entry for an emergency vehicle very difficult. J.A. 150-56.

Dr. Snydle stated that he personally had been harassed by petitioner Martin and others. J.A. 156. In February 1993, Dr. Snydle had been physically prevented from leaving his hotel near the clinic to go to work there for half an hour. Dr. Snydle feared for his physical safety during this blockade. J.A. 179.[4] The trial court entered detailed findings of fact crediting Dr. Snydle's testimony on these points. J.A. 53-55.

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[4] Dr. Syndle also testified that after the first permanent injunction, Meredith Raney, another leader of Operation Rescue, followed him by car from the clinic. When Dr. Snydle pulled off the highway, Mr. Raney parked beside him, grinned at him, made a gun hand symbol, and drove away. J.A. 190.

Captain Allgeyer of the Melbourne Police Department testified that, since the September 1992 injunction, systematic anti-abortion protesting ("impact training") organized by Operation Rescue, J.A. 247, and petitioners Madsen and Martin, J.A. 415-16, *see* J.A. 108, 109, had considerably increased the crowds blocking access to the clinics and that the incidence of police reports involving anti-abortion protesters had increased. J.A. 267-68. Captain Allgeyer testified that he had charged petitioner Hobbs with obstructing traffic and blocking clinic access several times. J.A. 275-76. Allgeyer stated that the number of protestors was creating a traffic problem frequently requiring police presence to ensure that emergency vehicles could reach the clinic and to protect pedestrians and motorists. J.A. 259, 263-64. The trial court entered detailed findings of fact crediting Captain Allgeyer's testimony. J.A. 50-52.

The trial court found that in violation of the September 30, 1992 injunction, petitioners and their associates were blocking access to the clinic, and physically abusing and threatening persons seeking access to the clinic. The court found that the noise made by petitioners and their associates was interfering with medical procedures at the clinic and endangering patient care. The court further found that petitioners and their associates were stalking clinic staff and harassing them and their families at their homes. J.A. 55-56.

Having found that the prohibitions of the September 30, 1992 injunction were insufficient, the trial court amended the injunction to prohibit petitioners and those "acting in concert" with them with notice of the injunction[5] from trespassing on clinic property, blocking clinic access, demonstrating within 36 feet of the clinic property on three sides, making noise that

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[5] As discussed below, the amended permanent injunction tracks the language of Fla. R. Civ. P. 1.610(c), which is modeled on Fed. R. Civ. P. 65, in making the injunction binding on those "acting in concert" with the named parties so long as they have notice.

could be heard in the clinic during surgery times as defined in the order, making uninvited contact with persons seeking access to the clinic within a 300 foot zone around the clinic, demonstrating within 300 feet of the homes of clinic staff or threatening clinic staff. The order also contains notice and penalty provisions, and further defines invited contact. J.A. 50-64.

The amended permanent injunction expressly reiterates petitioners' freedom to exercise their First Amendment rights subject to the restrictions. Indeed, the order specifically notes certain areas near the clinic, including a large area five feet from clinic property, where respondents are to be allowed to demonstrate, and requests the city to define a crosswalk to assist petitioners and their associates to reach that area. J.A. 57-58,62.

The Florida Supreme Court and Eleventh Circuit Decisions

On appeal, the Fifth District Court of Appeals certified the trial court's order to the Florida Supreme Court, J.A. 3, and the Florida Supreme Court upheld the injunction. The court reviewed the record and found that the trial court's factual findings were supported by competent and substantial evidence. The Florida high court held that the restrictions were narrowly tailored to address the specific abuses, that the restrictive language of the injunction was content-neutral, that the state had significant governmental interests at stake, that the injunction left open ample alternative means of communication and that the doctrine of prior restraint did not apply. The court also found that the restrictions were not unconstitutionally vague as they were sufficiently specific to put petitioners on notice of the prohibitions, and were fashioned to address specific abuses. Pet. App. A. Madsen, Martin and Hobbs then sought review in this Court.

On April 13, 1993 (five days after issuance of the amended permanent injunction by the state trial court in this

case), Myrna Cheffer filed suit in the United States District Court for the Middle District of Florida challenging the constitutionality of the April 8, 1993 injunction and seeking to enjoin its enforcement. The federal trial court denied Cheffer's motion for injunctive relief and Cheffer appealed. The state moved to dismiss or to affirm for lack of subject matter jurisdiction in light of this Court's decisions in *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923) and *D.C. Court of Appeals v. Feldman*, 460 U.S. 462 (1983), which hold that the lower federal courts have no jurisdiction to review state court decisions, even where those decisions are challenged as unconstitutional. On October 20, 1993, just eight days before the Florida Supreme Court issued its opinion in the state case, the Eleventh Circuit vacated the district court's order and remanded with instructions to consider issuance of a preliminary injunction. *Cheffer v. McGregor*, 6 F.3d 705 (11th Cir. 1993).[6]

The Eleventh Circuit panel held that the injunction is "in effect" a statute -- a conclusory transformation that enabled the court to find standing for Cheffer to challenge the injunction without even alleging that it applied to her, and to find the injunction impermissably viewpoint-based because it does not apply to the world at large. *Id.* As Judge Payne pointed out in dissent, "The majority's unprecedented decision to assume an impossibility -- that a state court judge has passed legislation -- skews its analysis." *Id. at* 714.

SUMMARY OF ARGUMENT

The issues raised in this case stem from the exercise of traditional judicial power to fashion injunctive remedies that respond to specific conditions and circumstances adjudicated

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[6] A week later the Eleventh Circuit summarily denied the state's motion to dismiss. The state's motion for rehearing en banc is still pending.

before the trial court. The trial court's exercise of that power was appropriately fashioned as a patient and incremental response to an escalating pattern of harassing and intimidating conduct accompanying the demonstrations organized by petitioners. As this Court has recognized, the courts have broad remedial power to fashion specific relief in an individual case, based on the evidence submitted and testimony given about the particular circumstances of the claims raised, despite the fact that the relief imposed often has an incidental or even a direct effect upon conduct that has some expressive value. In particular, courts have frequently exercised this accepted power to regulate demonstrations that threaten a continuing disruption of legitimate public services and activities at particular sites, such as schools, medical facilities, courts, voting booths, businesses, and other such facilities. Such power was properly exercised here.

The exercise of traditional judicial power to grant injunctive relief in an appropriate case against conduct that has occurred and is occurring does not constitute a prior restraint upon speech. Nor does it constitute a "legislative" imposition, even if it has incidental effects on the speech or association rights of parties subject to the injunction. Thus, the "overbreadth" arguments asserted by petitioners as though the injunction were a statute or ordinance are fundamentally misplaced. In addition, the trial court's injunctive orders in this case are not framed as "content-based" or "viewpoint-based" directives. Nor are they transformed into "content-based or "viewpoint-based" orders merely because, as injunctive orders entered in a particular case, they are addressed only against those parties whose conduct has been adjudicated in this lawsuit and who have been judged on the evidence presented to be the appropriate objects of injunctive relief.

The Florida Supreme Court correctly held that each restriction of the injunction is necessary to counteract a specific threat to a significant state interest. The trial court

found, and the state high court affirmed, that petitioners' actions and those of their associates threatened the safety of the medical procedures performed at the clinic, prevented patients, clinic staff, and emergency vehicles from access to the clinic, and threatened the safety and privacy of clinic staff and patients in their homes. The state has an unquestionable interest in protecting safe medical services, access to public medical services, and the safety and privacy of citizens in their homes. The injunction's restrictions are, as the state high court found, "no broader then necessary to restrain the unlawful conduct" endangering these interests.

ARGUMENT

As an injunction, the trial court's order restrained only those whose conduct was shown to require restraint. Its case-specific scope does not render it content-based, any more than an injunction against similarly unlawful conduct by "pro-choice," civil rights, union, or any other category of demonstrators would be. And as an injunction, the trial court's order was not "overbroad" just because it was directed at specific persons and groups shown to have acted unlawfully and those acting in concert with them. The *only* question here is whether the injunction was an appropriate response to an escalating pattern of harassing and intimidating conduct accompanying the demonstrations organized by petitioners. Because the trial court's findings of fact show that the injunction is narrowly tailored to protect significant state interests endangered by the actions of petitioners, the injunction should be upheld.

I. THIS CASE INVOLVES THE EXERCISE OF TRADITIONAL JUDICIAL POWER TO FASHION INJUNCTIVE REMEDIES THAT RESPOND TO SPECIFIC CIRCUMSTANCES ADJUDICATED BEFORE THE COURT.

A. The Courts Have Frequently And Traditionally Exercised Their Broad Equitable Powers To Prevent Or Minimize Continuing Disruption of Legitimate Public Activities At Particular Sites, Such As Medical Facilities, Businesses, Schools, And Courts.

It is broadly accepted that when the government acts to restrain harmful conduct, it has the authority to do so despite any incidental or even direct impact on First Amendment rights. *See, e.g., Wisconsin v. Mitchell*, 113 S. Ct. 2194 (1993) (hate crimes); *United States v. O'Brien*, 391 U.S. 367 (1968) (burning draft card); *United States v. Gilbert*, 813 F.2d 1523 (9th Cir.), *cert. denied*, 484 U.S. 860 (1987) (harassment with intent to intimidate). In particular, it is well-recognized that courts acting in equity have broad traditional powers to fashion specific relief in response to existing circumstances that have been adjudicated before the court. *See, e.g., Milk Wagon Drivers Union v. Meadowmoor Dairies, Inc.*, 312 U.S. 287, 294 (1941); *Renegotiation Bd. v. Bannercraft Clothing Co.*, 415 U.S. 1 (1974). As the Florida Supreme Court accurately observed in this case, if the threshold requirements for an injunction are met, "the court has wide discretion in fashioning an appropriate remedy,"[7]

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[7] The broad and accepted scope of the equitable power to fashion an appropriate injunctive response to specific circumstances is clearly seen by comparing it to the narrower and more sensitive power of the courts to enforce judicial orders by contempt sanctions. Although this Court has cautioned that the contempt powers should be wielded in such a manner as to invoke "the least possible power adequate to the end proposed," *Spallone v. United States*, 493 U.S. 265, 276 (1990) (quotation omitted), and the outer limits of such powers are subject to some controversy, *see Bagwell v. International Union, United Mine Workers*, 244 Va. 463, 423 S.E. 2d 349 (1992), *cert. granted*, 113 S. Ct. 2439 (1993) (No. 92-1625), even the undisputed parameters of such powers are clearly formidable. *See Spallone*, 493 U.S. at 277-78; *United States v. United Mine Workers*, 330 U.S. 258 (1947). A fortiori, the more basic power to fashion injunctive relief appropriate to govern a particular factual situation involving private parties is properly afforded considerable deference as a traditional power of the courts. *See, e.g., Milk Wagon Drivers Union v. Meadowmoor Dairies*, 312 U.S. 287 (1941).

subject to the constraint that the injunction must be "carefully tailored to remedy only the specific harms shown." Pet. App. A-11; *see Meadowmoor*, 312 U.S. at 298 ("An injunction so adjusted to a particular situation is in accord with the settled practice of equity. . . .")

The relative paucity of cases from this Court involving First Amendment challenges to injunctive relief suggests the accepted broad scope of the lower courts' discretion in fashioning such relief based on particular findings of fact. The few cases from this Court that involve First Amendment challenges to injunctive relief are extreme cases: they involve facts far more egregious, and injunctions far more sweeping, than this case presents. *Compare Meadowmoor*, 312 U.S. 287 (upholding injunction barring all picketing in the state by a labor union in response to extensive violence) *with Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971) (vacating injunction that prohibited all leafletting by a particular group before it had even occurred).[8]

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[8] Petitioners rely on *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 924 (1982), in which this Court vacated an award against the NAACP and named persons for all business losses sustained by certain merchants during a largely peaceful seven-year boycott. This Court held the damages award was irrational and an abuse of discretion ("screens reality") because the trial court failed to attribute any portion of that loss to voluntary action

The broad equitable powers of the courts have frequently been invoked to control expressive conduct when necessary to prevent or minimize any continuing disruption of legitimate public services and activities at particular sites. This Court has emphasized that even in the context of a public forum, the proper analysis of government restraints on allegedly expressive conduct examines the effects of the particular expressive conduct at issue on the public activities typically occurrng at that location. "The crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time". *Grayned v. City of Rockford*, 408 U.S. 104, 116 (1972) Accordingly, in reviewing demonstrations at schools, protests at government facilities, labor disputes, and picketing against medical facilities such as occurred in this case, the Court has repeatedly indicated that the traditional injunctive powers of the courts can properly be exercised to ensure that the ordinary and legitimate activities that occur at these locations will not be significantly disrupted by expressive conduct that the court finds disruptive of such activities.

In *Grayned*, for example, this Court upheld a criminal ordinance that prohibited all picketing or other demonstrations within 150 feet of a school building during school hours, even though it concededly prohibited "some picketing that is neither violent nor physically obstructive." 408 U.S. at 120. Since *Grayned*, courts have regularly granted injunctions that bar such activities within a buffer zone around a school building to prevent disruption of school activities during school hours.

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in response to peaceful picketing. *Id.* at 924. The trial court also had granted an injunction against those engaged in the boycott, but the propriety of that injunction was not at issue before this Court, *id.* at 893-96 and n. 18, and thus was addressed only in passing. For this reason, the case is not authority on the issue of what limits the First Amendment imposes on the broad equitable powers of a court to fashion injunctive relief in response to specific circumstances adjudicated before the court.

See, e.g., Pickens v. Okolona Mun. Separate Sch. Dist., 594 F.2d 433, 437 (5th Cir. 1979) (upholding one-block buffer zone around school). Such orders are entirely appropriate when entered in response to specific conditions adjudicated before the court. In some cases, courts have found it necessary to protect school premises by punishing nonparties to an injunction in contempt proceedings where those persons violated injunctions designed to protect schoolchildren's access to class by insulating the school premises against outside agitation. *United States v. Hall*, 472 F.2d 261 (5th Cir. 1972). In judging whether any such further steps are "the least possible power adequate to the end proposed," *Anderson v. Dunn*, 19 U.S. 204, (1821), there is little doubt that the trial judge is best situated to determine the exigencies at hand.

Courts have also frequently been called upon to use their power to protect government facilities against disruptive protest activities on or about their premises. In *Cox v. Louisiana*, 379 U.S. 559 (1965), this Court relied on "the special nature of the place" to uphold limitations on picketing in or near a courthouse. *Grayned*, 408 U.S. at 120. In *Cameron v. Johnson*, 390 U.S. 611 (1968), this Court upheld limitations on picketing that was conducted in such a manner as to obstruct or reasonably interfere with free ingress or egress to a courthouse. And in *Burson v. Freeman*, 112 S. Ct. 1846 (1992), this Court upheld a statute prohibiting political speech within 100 feet of the entrance to a polling place, relying on the states' widespread and long-standing experience that some restricted zone around polling places is necessary to protect the right to vote free of intimidation and fraud.

In labor disputes, it is common for courts to intervene where striking workers are engaged in picketing and patrolling the premises at their worksite. *See, e.g. Carpenters' Local No. 33 v. NLRB*, 873 F.2d 316 (D.C. Cir. 1989). In many states, the exercise of such equitable power in labor disputes has been sanctioned by legislation specifying that peace orders can be imposed in labor disputes involving picketing and

patrolling. *See, e.g.*, Fla Stat. §§ 447.09 (12), (13); 447.17 (2) (1993); Iowa Stat. § 732.5 (1993); N. M. Stat. § 50-2-2 (1993); Va. Stat. § 40.1-83 (1993). In nonlabor disputes, also, courts have enjoined demonstrations and similar activities from disrupting legitimate business activities. *See, e.g.*, *Resident Advisory Bd. v. Rizzo*, 503 F. Supp. 383 (E.D. Pa. 1980) (buffer zone granted that barred picketing and demonstrations in specified areas around site where townhouses were being constructed to prevent disruption).

Cases that involve injunctive orders aimed at protecting public services provided at medical facilities are nothing more than standard applications of the same approach. The lower federal courts have routinely upheld injunctions designed to protect the integrity of medical services at clinics such as this one. *See, e.g., Northeast Women's Center, Inc. v. McMonagle*, 939 F.2d 57 (3d Cir. 1991) (500-foot buffer zone around clinic); *Medlin v. Palmer*, 874 F.2d 1085 (5th Cir. 1989) (restricting activities within 150 feet of clinic); *Portland Feminist Women's Health Ctr. v. Advocates for Life, Inc.*, 859 F.2d 681 (9th Cir. 1988) (limitation on picketing outside clinic).[9] These cases do not present isolated examples of rogue judges entering orders insensitive to constitutional rights; to the contrary, they follow a long line of cases in which state and federal courts have carefully crafted relief appropriate to the particular facts to protect schools, government, courts or other important public facilities from recurring instances of harassing and intimidating conduct accompanying demonstrations. Where such harassing and intimidating conduct is repeated and intransigent, as in this case, an effective judicial response is

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[9] *See also* Pet. App. A-24; *Hirsh v. City of Atlanta*, 261 Ga. 22, 401 S.E.2d 530, (demonstrations restricted outside clinic); *cert. denied*, 112 S. Ct. 75 (1991) *Planned Parenthood v. Operation Rescue*, 406 Mass. 701 550 N.E.2d 1361 (1990) (same); *Bering v. Share*, 721 P.2d 918 (Wash. 1986), *cert. dismissed*, 479 U.S. 1050 (1987) (same).

clearly warranted.[10]

In this case, acts that constituted intimidation, harassment, physical abuse, and threats of violence were repeatedly documented by the trial court in granting not one, not two, but three separate injunctions after full judicial hearings on the facts of this case. Such acts, even if they accompanied expressive conduct, were entirely incompatible with the central purpose of this facility, which is to provide medical services, and in particular abortion services, to patients who seek such services. It was thus appropriate for the trial court, confronted by these continuing disruptive actions, to grant successively broader injunctions designed to meet the problems presented as directly and efficiently as possible.[11] The equitable orders granted here did so, and were therefore proper.

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[10] Repeated expressive conduct, in itself, often is judged by the courts to constitute harassment properly subject to restriction. *See, e.g., In re Sassower*, 114 S. Ct. 2 (1993) (per curiam) (repeated legal filings may be enjoined); *In re McDonald*, 489 U.S. 180 (1989) (per curiam) (same); *Sassower v. Abrams*, 833 F. Supp. 253 (S.D.N.Y. 1993) (injunction granted to allow other federal courts summarily to dismiss lawsuits filed involving specified subject matter). Similarly, courts routinely grant restraining orders, enforceable in criminal contempt proceedings, that direct one party not to annoy or disturb another or to approach within a specified distance of the other party's residence or workplace. *See, e.g., United States v. Dixon*, 113 S. Ct. 2849, 2854-55 (1993). *See also People v. Smith*, 392 N.Y.S.2d 968, (telephone harassment not protected by First Amendment) *cert. denied*, 434 U.S. 920 (1977).

[11] Conversely, if a court or government entity were to refuse to accord this traditional protection to legitimate activities such as the provision of medical and abortion services at these clinics, the clinics could argue that the government is unconstitutionally sanctioning conduct that creates an "undue burden" on the right to obtain an abortion, as explicitly discussed in this Court's recent decisions. *See Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2821 (1992) (plurality opinion).

II. THE EXERCISE OF TRADITIONAL JUDICIAL POWER TO GRANT INJUNCTIVE RELIEF IN AN APPROPRIATE CASE DOES NOT CONSTITUTE A "LEGISLATIVE" RESTRICTION AND IS NOT "VIEWPOINT-BASED," EVEN IF IT RESTRICTS SPEECH BY PARTIES SUBJECT TO THE INJUNCTION.

A. The Injunction is Not a Statute.

The Florida Supreme Court properly treated the third injunction granted in this case as a fairly standard order fashioning an equitable remedy to control proven disruptive conduct, on the basis of extensive findings of fact. Nonetheless, the Eleventh Circuit, reviewing the third injunction granted in this case, declared that the trial judge "in effect, created a criminal statute prohibiting `pro-life' free speech activity" at this medical facility. *Cheffer*, 6 F.3d at 708. The Court of Appeals proceeded to analyze this third injunction as if it were a criminal statute. *Id.* at 708, 712. That approach -- which petitioners adopt in this case -- is in error and skews petitioners' analysis.

Unlike a statute, which can be challenged "on its face," an injunction is by definition "as applied"; it *is* the application of law to specific facts proven in a particular case. Indeed, any "as applied" analysis occurs upon the issuance of an injunction, when the trial court adjudicates the underlying facts and determines the appropriate remedy. The only question on review is whether the equitable remedy fashioned by the trial court fits the facts of the case. As the Florida Supreme Court correctly noted, the fact-sensitive nature of this task demands that the trial court's on-the-spot resolution of this issue be afforded deference by reviewing courts. Pet. App. A-11; *Meadowmoor*, 312 U.S. at 294.

B. The Injunction Is Not Content- Or Viewpoint-Based.

The injunctive orders issued by the trial court in this case have nothing to do with the content of any speech or expression. They are directed instead at the particular actions engaged in by petitioners and their associates in the immediate vicinity of this medical facility that created a risk to public health and safety. The conduct prohibited by the amended permanent injunction includes entering the clinic premises; blocking or interfering with access to these medical facilities and similar conduct at the homes of clinic staff or patients; blocking and crowding in the street and sidewalk approaching the clinic; and harassment, intimidation, and physical abuse directed at patients or clinic staff, particularly at their homes and places of work. The injunction restricts this harmful and disruptive conduct without reference to the content or viewpoint being advanced.

As the Florida Supreme Court properly reasoned, these orders cannot be characterized as "content-based," let alone as "viewpoint-based." Pet. App. A-14-15. To state the obvious, "[i]t is true that this injunction applies only to [the persons named therein], but that is because it is only those persons who the Center has proved have created and are continuing to create a threat of violence and intimidation." *McMonagle*, 939 F.2d at 63. The petitioners argue that the injunction is content-based because it enjoins the harmful conduct of certain persons who hold a particular view on abortion. *See Cheffer*, 6 F.3d at 710-11. *Contra*, *Portland Feminist Women's Health Center*, 859 F.2d at 686; *McMonagle*, 939 F.2d at 63. The fundamental error in petitioners' and the Eleventh Circuit's analysis is, again, that they treat the injunction like a statute. A statute barring only petitioners from the buffer zone might well be susceptible to constitutional challenge as content-based. But the instant injunction properly confines its prohibitions to those before the court whose conduct required restraint, and

cannot be attacked as content- or viewpoint-based simply because no persons holding different views were shown in this action to have violated the law. Similar complaints raised in other cases under the Equal Protection Clause have been soundly rejected. *See, e.g., Pickens*, 594 F.2d at 438.

Petitioners argue that the injunction's extension of its prohibitions to persons acting in concert with the named parties, with notice of the injunction, renders it viewpoint-based. But it is commonplace for injunctive orders, following the explicit authority of the applicable rule, to restrain not only parties but also "those persons in active concert or participation with them who receive actual notice of the order." Fed. R. Civ. P. 65; Fla. R. Civ. P. 1.610(c); *cf. Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 693 n.32 (1979). The rule allows courts to extend the injunction to persons 'acting in concert" with notice to preserve the common law doctrine that "defendants may not nullify a decree by carrying out prohibited acts through aides and abettors, even though they were not parties to the original proceeding." *Regal Knitwear v. NLRB*, 324 U.S. 9, 14 (1945). To say that such an order cannot be entered because it is "viewpoint-based" is to say that no striker picketing can ever be enjoined because management is not so enjoined. Any such suggestion is clearly wrong.[12]

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[12] Petitioners argue that the court's comments made at post-order, non-evidentiary, preliminary hearings which followed the arrests of 50 people who violated the injunction show that the court intended the injunction to apply to all those with pro-life beliefs. This hearing was not before the Florida Supreme Court and is not part of the record in this case. In any event, petitioners have lifted the comments out of context. A complete examination of the dialogue at the April 12, 1993, hearing shows that the trial court intended the injunction to apply only to those "in concert with" the named respondents, and that the trial court explained to the arrestees that the injunction would not apply to them if they were not "in concert with" the named parties. J.A. 68, 74 (excerpts only).

C. **The Injunction** is Not Overbroad.

Petitioners also argue, relying on *Cheffer*, that the injunction's application to those "acting in concert" with notice of its provisions renders it overbroad. Again, petitioners erroneously treat the injunction as a statute; but unlike a statute, an injunction is binding only on those within its scope. Application of this injunction to a pro-life protester not "acting in concert" with one of the named parties, as that term has been defined by the courts,[1] would exceed the authority of the injunction. Conversely, the mere fact that the injunction extends to those "acting in concert" with the named parties, as expressly authorized by the rule, does not render it overbroad. *See Regal Knitwear*, 324 U.S. at 13-14.

Moreover, the specific facts of this case clearly warranted the extension of the injunction's prohibitions to those "acting in concert" with Operation Rescue and Rescue America. The evidence showed that the unlawful activities at issue were organized by Operation Rescue. J.A. 247-51, 269-70. Thus, there was a specific danger proven in this case that the named defendants would "nullify [the injunction] by carrying out prohibited acts through aiders and abettors," *Regal Knitwear*, 324 U.S. at 14, unless prevented from doing so.[2]

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[1] *See, e.g. Portland Feminist Women's Health Center*, 859 F.2d at 687, (defining scope of "acting in concert"); *United States v. Hall*, 472 F.2d 261 (5th Cir. 1972) (same).

[2] Similarly, this evidence warranted the injunction's prohibition on petitioners' soliciting others to commit the prohibited acts.

D. The Injunction Affords Petitioners Ample Alternative Means to Express Their View Near the Clinic.

The injunction carefully respects the First Amendment rights of petitioners while protecting the significant state interests identified by the trial court. *See* pp. 24-30, *infra*. The injunction clearly reflects the trial court's conscientious balancing of petitioners' rights to express their views and to associate, against patients' rights to obtain, and the clinic's right to provide, necessary medical services. Moreover, as shown above, the injunction is similar to other injunction issued by trial courts in similar circumstances; its provisions do not stand out as extreme. *Compare McMonagle, supra, Portland Feminist Women's Health Center*, 859 F.2d at 681; *Bering v. Share*, 721 P.2d 918 (Wash. 1986); *Parkmed Co. v. Pro-Life Counselling, Inc.* 91 A.D. 2d 551, 457 N.Y.S. 2d 27 (A.D. 1982).

The injunction clearly states that petitioners may engage in First Amendment activities in the vicinity of the clinic. As the Florida Supreme Court noted,

> Operation Rescue is entirely free to do the following at any time on any day: place an unrestricted number of picketers along the south edge of Dixie Way and both the east and west edge of U.S. A; engage in singing, chanting, and whistling, as long as it cannot be heard inside the Clinic during the designated times; engage in "sidewalk counseling" of any Clinic patient who invites contact outside the five-foot and thirty-six-foot buffer zones; and picket in the neighborhoods of Clinic workers outside the three-hundred-foot buffer zone. Pet. App. A-19.

See also Heffron, 452 U.S. at 654-55; *Bering*, 721 P.2d at 930; *Medlin*, 874 F.2d at 1090.[15]

E. The Injunction Is Not a Prior Restraint.

As established in this Court's previous decisions, a "prior restraint" on speech is generally an absolute prohibition laid down on the basis of the content of the speech before the speech or publication may occur at all. *Alexander v. United States*, 113 S. Ct. 2766, 2771 (1993). Because they are imposed before the fact, are content-based, and do not provide adequate alternative means for communicating the ideas restrained, prior restraints are strongly disfavored in the law. *See, e.g., New York Times Co. v. United States*, 403 U.S. 713 (1971).

The instant injunction, however, does not suffer from these defects. Just as the post-hoc remedy accorded here cannot be analyzed as a legislative enactment, it also cannot be equated to a prior restraint; injunctions are remedies accorded after the fact, and, as the Florida Supreme Court correctly understood, "lie[ ] within the sound discretion of the trial court and will be affirmed absent a showing of abuse of discretion." Pet. App. A-11. *See Meadowmoor*, 312 U.S. at 294; *McMonagle*, 939 F.2d at 57.[16]

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[15] The express provision of a location five feet from the clinic for petitioners to demonstrate also undercuts any argument that the injunction improperly targets their viewpoint. As Justice Powell observed in *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976), if the trial court "had been concerned with restricting the message purveyed by the [protestors], it would have tried to [remove] them or restrict their number rather than circumscribe their choice as to location." Id. at 82 n.4.

[16] Petitioners argue that the Florida Supreme Court erred in adopting the reasoning of *McMonagle* on this point, but none of petitioners' authorities suggest any different analysis. The activities that were restricted here were not mere "peaceful pamphleteering" that created no disruptions or disturbances, as in *Organization for a Better Austin*, 402 U.S. at 417-19. They were found instead to include repeated instances of

All persons subject to the injunctions here were permitted to exercise their rights freely through their speech and their conduct at this medical facility, until a lawsuit was eventually brought to determine whether their particular conduct at that site constituted an abuse of those rights. After the trial court had heard evidence about the activities that had occurred, it determined that specific time, place and manner restrictions on those activities were necessary to protect persons and activities at this medical facility, and laid down such constraints in three successive injunctions, all imposed after the trial court had fully adjudicated the circumstances. This case thus presents the kind of "judicial determination in an adversary proceeding" that "suffices to impose a valid final restraint." *Freedman v. Maryland*, 380 U.S. 51, 58 (1965).

Furthermore, the prior restraint doctrine is inapplicable because the instant injunction is content neutral and allows petitioners ample alternative means to express their views near the clinic, as discussed above. *See also Alexander*, 113 S. Ct. at 2772-73 & n.2 (rejecting the "essentially limitless expansion of the term [prior restraint] that petitioner proposes"). Thus, far from involving a prior restraint, this case involves reasonable time, place and manner restrictions, imposed after the fact -- after petitioners had repeatedly turned opportunities for expression into acts of disruption.

F. The Injunction Provides Adequate Notice to Petitioners of the Conduct Prohibited.

A government restriction is vague if it "either forbids or requires the doing of an act in terms so vague that men of

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intimidation, harassment, and threats of violence, *see* Pet. App. A-23-24. *Carroll v. Presidents & Comm'rs of Princess Anne*, 393 U.S. 175 (1968), hinged on the fact that no notice of the injunction was provided to those enjoined; and *Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969), involved a local ordinance which was overbroad, and thus facially void.

common intelligence must necessarily guess at its meaning and differ as to its application." *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926). The vagueness doctrine is based on due process principles that require fair notice and warning, and sufficient specificity to avoid arbitrary and discriminatory enforcement. *Smith v. Goguen*, 415 U.S. 566 (1974). "The normal standard of specificity required for an injunction is that 'the party enjoined must be able to ascertain from the four corners of the order precisely what acts' are forbidden." *In re Baldwin-United Corp.*, 770 F.2d 328, 339 (2d Cir. 1985). To the extent there is any doubt as to what the trial court intended, the injunction should be construed narrowly. *Ibid.*

In the Florida Supreme Court, petitioners challenged as vague the ban on "sounds or images observable to or within earshot of the patients inside the Clinic;" the ban on "physically approaching any person seeking the services of the Clinic" within 300 feet of the clinic, and the ban on demonstrating within 300 feet of the residences of clinic staff.[17]

The first ban is sufficiently specific to put petitioners on notice that loud noises during surgery and recovery would not be tolerated and signs could not be displayed from ladders above the clinic's fence in such a manner that patients were forced to observe them during surgery and recovery. Further specificity is not required. *See McMonagle*, 939 F.2d at 72 (upholding identical ban); *Portland Feminist Women's Health Center*, 859 F.2d at 685 (rejecting claim that injunction was impermissibly vague for failing to provide a specific decibel level for prohibited sounds; "Greater particularity, while it may be desirable, is not required under Rule 65(d).")

The second and third bans were fashioned to combat

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[17] To the extent petitioners now seek to challenge additional provisions as vague, this Court should not entertain such new assertions not raised below.

the specific abuses described above, and each provides reasonable notice of the behaviors that would not be tolerated. "Condemned to the use of words, we can never expect mathematical certainty from our language. The words of the [ban] are marked by 'flexibility and reasonable breadth, rather than meticulous specificity,' [and] . . . it is clear what the [ban] as a whole prohibits." *Grayned*, 408 U.S. at 110. *See Medlin*, 874 F.2d at 1091. "Those subject to [the] strictures [of the injunction] have adequate notice of what is required of them, and sufficient assurance of the direction enforcement will take." *Portland Feminist Women's Health Center*, 859 F.2d at 687.

III. THE INJUNCTION IS NARROWLY TAILORED TO PROTECT SIGNIFICANT STATE INTERESTS THREATENED BY THE CONDUCT OF PETITIONERS.

The Florida Supreme Court found that the instant injunction is necessary to protect several significant state interests: protecting the state and federal constitutional rights of all Florida citizens, which include a woman's freedom to seek lawful medical or counseling services in connection with pregnancy, ensuring public safety and order, promoting the free flow of traffic on public streets and sidewalks, and protecting the property rights of all Florida's citizens. Pet. App. A-15-16. As this Court has recognized, the state's interest in maintaining order and public safety includes not only the prevention of criminal acts, but also the state's interest in ensuring traffic and crowd control, keeping open public access to buildings providing public services, prevention of excessive noise levels, protection of property rights and the privacy of the home, and ensuring appropriate medical standards. *Bray v. Alexandria Women's Health Clinic*, 113 S. Ct. 753 (1993) (Kennedy, J., concurring); *Gregory v. Chicago*, 394 U.S. 111, 118 (1969) (Black, J. & Douglas, J.,

concurring). Each of the provisions in the injunction serves a state interest that this Court has recognized as significant.

The Florida Supreme Court also correctly found that the injunction was "no broader than necessary to restrain the unlawful conduct," Pet. App. A-11, and that each of the restrictions was necessary to counteract a specific danger to a significant state interest created by petitioners' actions since the September 30, 1992 permanent injunction. Pet. App. A-16-19. The injunction specifically protects petitioners' First Amendment rights, including their right to demonstrate near the clinic.

A. Each Prohibition of the Injunction Is No Broader Than Necessary to Protect The Significant State Interest At Stake.

1. Petitioners Concede The Prohibitions on Trespassing or Blocking Access Are Narrowly Tailored To Ensure Access to Public Services.

The injunction prohibits petitioners from entering the clinic property or blocking access to the clinic. J.A. 57. Petitioners concede the validity of these provisions, Pet. Br. at 27 n.19, 28-30, as indeed they must, there is no First Amendment right to trespass or block ingress and egress. *See Cameron*, 390 U.S. 611 (upholding law that prohibited picketing in front of a courthouse unreasonably interfering with free ingress or egress); *Cox*, 379 U.S. 559 (demonstrators may not cordon off street or entrance to a building allowing no one to pass who refused to listen to them). Consequently, paragraphs one and two of the injunction should be affirmed.

2. The 36-Foot Buffer Zone Is Narrowly Tailored to the Need for Traffic and Crowd Control.

The injunction prohibits petitioners from demonstrating within 36 feet of the clinic property on three sides. The buffer zone keeps petitioners off the street in front of the clinic (Dixie Way), out of the entrances to the clinic's two parking lots and away from their perimeter. The restriction expressly provides that petitioners may demonstrate up to five feet from the clinic property line on the fourth side and requests the city to create a crosswalk to assure petitioners' safety and ease of access to this area. J.A. 57-58.

As the trial court found, testimony during the three day evidentiary hearing conclusively established the heavy traffic conditions on Dixie Highway in front of the clinic, the high number of protestors near the clinic and the resultant danger of injury to pedestrians, and the risk that emergency vehicles would not be able to reach the clinic if Dixie Way or the clinic parking lots were blocked. J.A. 50-53, 55; *see* J.A. 236-317 (testimony of Captain Allgeyer). The state's interest in the orderly movement and control of such a situation is a "substantial consideration." *Heffron v. International Soc'y for Krishna Consciousness*, 452 U.S. 640 (1981). *See also Cameron*, 390 U.S. at 611; *Planned Parenthood v. Project Jericho*, 52 Ohio St. 3d 56, 556 N.E.2d 157 (1990) (significant state interest in ensuring that trade and commerce, including the provision of medical services, are conducted unimpeded by breaches of peace and threats to safety of those engaged in or patronizing lawful business).

The buffer zone is consistent with similar remedies ordered by other lower courts in such situations. *See, e.g. Portland Feminist Women's Health Center*, 859 F.2d at 681 (upholding a over twelve foot "free zone"); *Thompson v. Police Dept. of New York*, 145 Misc. 2d 417, 546 N.Y.S. 2d 945 (1989) (upholding buffer zone in front of clinic entrance). The exact dimensions of such a buffer zone will, of course,

vary with the layout of the particular site, and with the particular dimensions of the problems of access and crowd control. There is no basis for this Court to second-guess the trial court's 36-foot line on three sides of the clinic. *See Burson v. Freeman*, 112 S. Ct. at 1857; *Portland Feminist Women's Health Center*, 859 F.2d at 686.

3. The Prohibitions on Noise That Disrupts Surgical Procedures and on Harassing Patients and Clinic Staff Ensure Safe Medical Procedures.

The injunction prohibits petitioners from making noise that can be heard in the clinic or presenting images visible from the clinic during surgery and recovery times as defined in the order. J.A. 59.

As the trial court found, the noise level created by the Rescue America demonstrations organized by petitioners was very high; it included amplified sound and persons standing on ladders shouting over the clinic fence. J.A. 52, 53. The trial court further found, based on Dr. Snydle's testimony, that many patients had high anxiety levels manifested by physical symptoms, that these symptoms were caused or exacerbated by the noise and signs of petitioners, and that the risks associated with surgical procedures performed by the clinic were increased when procedures were performed on patients with increased anxiety levels. J.A. 54. As the Florida Supreme Court noted, the prohibition on displaying "images observable" by patients in the clinic during surgery and recovery periods is clearly targeted at the display of signs from ladders above the clinic fence. Pet. App. A-21. These findings justified the measures enunciated in paragraph four of the injunction.

This Court has previously recognized that safeguarding patient health and maintaining medical standards are important government interests that can justify restrictions on expressive

conduct. *NLRB v. Baptist Hospital*, 442 U.S. 773 (1979). Legal abortions are no exception. *Roe v. Wade*, 410 U.S. 113 (1973). *See Lewis v. Pearson Foundation*, 908 F. 2d 318 (8th Cir. 1990) (state has significant interest in protecting access to legal abortion); *Portland Feminist Women's Health Center*, 859 F.2d 681 (9th Cir. 1988) (protecting rights of clinic and its patients to safe medical services are important interests); *see also Planned Parenthood v. Operation Rescue*, 406 Mass. 701, 550 N.E.2d 1361 (1990); *Bering v. Share*, 106 Wash. 2d 212, 721 P.2d 918 (1986), *cert. dismissed*, 479 U.S. 1050 (1987)

This Court has also recognized a state's significant interest in controlling disruptive sound levels, especially where, as here, there is a "captive audience," and the noise is preventing the smooth functioning of a public service. *See Grayned v. Rockford*, 408 U.S. 104 (ordinance that prohibited conduct tending to disrupt classwork upheld due to significant state interest in undisrupted school sessions); *Medlin v. Palmer*, 874 F.2d 1085 (protecting patients of hospitals and clinics from unwarranted intrusion of noise generated by pro-life activists are significant state interests); *See also Portland Feminist Women's Health Center*, 859 F.2d at 685; *Eanes v. State*, 318 Md. 436, 569 A.2d 604, *cert. denied*, 110 S. Ct. 3218 (1990).

The same evidence of increased patient anxiety and increased surgical risk and the same state interest in assuring proper medical care sustain the provisions of the injunction that prohibit petitioners from assaulting, threatening or harassing patients entering the clinic or from communicating with patients within 300 feet of the clinic unless invited to do so. J.A. 59-60. The trial court found that some patients were turned away from the clinic by the protestors, and that many of those who entered the clinic suffered from anxiety and hypertension. The delay and the anxiety so caused increased the risk of the surgical procedure. J.A. 54. The prohibitions on harassing patients in paragraphs five, seven, and eight of

the injunction specifically address these problems.

As the Florida Supreme Court correctly held, Florida citizens are entitled to unimpeded access to licensed medical facilities and to freedom from unwanted confrontations and communications when undergoing lawful medical treatment, particularly where the effect of such confrontations is to place the patient's health and safety in jeopardy. Pet. App. A-15-16, citing *Frisby v. Schultz*, 487 U.S. 474 (1988); *see Roe v. Wade*, 410 U.S. at 113 (safeguarding patient health and maintaining medical standards are important government interests).

The protections of the injunction that prohibit assaulting or threatening clinic staff, J.A. 60 (¶¶ 7,8), also, obviously, serve the same state interest in assuring medical care as well as protecting the rights of citizens to conduct their affairs free of physical harm and harassment or intimidation. "[A] physical assault is by no stretch of the imagination expressive conduct protected by the First Amendment." *Wisconsin v. Mitchell*, 113 S. Ct. at 2199.

4. The Prohibitions on Demonstrating In Front of Doctors' Homes or Harassing Their Families Protect Property and Privacy Rights.

The injunction prohibits petitioners from demonstrating within 300 feet of the homes of clinic staff or owners, blocking access to their homes, or assaulting or intimidating their families and guests.

There is little question that the state's interest in protecting the well-being, tranquility, and privacy of the home is "of the highest order in a free and civilized society." *Carey v. Brown*, 447 U.S. 455, 471 (1980). In *Frisby*, this Court observed that one important aspect of the notion of residential privacy is the protection of the unwilling listener: although individuals can simply avoid unwanted speech in many areas, "the home is different." 487 U.S. at 484, *see id.* at 486

(picketing at the home "intrude[s] upon the targeted" captive audience). Indeed, the home is "the one retreat to which men and women can repair to escape from the tribulations of their daily pursuits . . . ." *Carey*, 447 U.S. at 471. *See Gregory v. Chicago*, 394 U.S. 111, 118 (1969) (the home is where people "can escape the hurly-burly of the outside business and political world . . . ."); Landwehr, Unfriendly Persuasion: Enjoining Residential Picketing, 43 Duke L.J. 148 (1993).

As the trial court found, and as shown at the evidentiary hearing, protestors organized by Operation Rescue blockaded Dr. Snydle in his hotel, demonstrated in front of the residences of other clinic staff, and harassed the minor children of clinic staff in their home. J.A. 53-54, 174-79, 490-524. These facts warranted the prohibitions of paragraph six of the injunction.

CONCLUSION

For the reasons stated above, the judgment of the Florida Supreme Court in this case should be affirmed.

Respectfully submitted,

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

JUDY MADSEN, ED MARTIN, and SHIRLEY HOBBS,
Petitioners,
v.
WOMEN'S HEALTH CENTER, INC., AWARE WOMAN CENTER FOR CHOICE, INC., EPOC CLINIC, INC., and CENTRAL FLORIDA WOMEN'S HEALTH ORGANIZATION, INC.,
Respondents.

On Writ of Certiorari to the Supreme Court of Florida

BRIEF FOR NATIONAL ABORTION FEDERATION AND PLANNED PARENTHOOD FEDERATION OF AMERICA, INC. AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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IN THE

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v.

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WOMEN'S HEALTH ORGANIZATION, INC.,
Respondents.

On Writ of Certiorari to the Supreme Court of Florida

BRIEF FOR NATIONAL ABORTION FEDERATION AND PLANNED PARENTHOOD FEDERATION OF AMERICA, INC. AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

INTEREST OF *AMICI CURIAE*

National Abortion Federation ("NAF") and Planned Parenthood Federation of America, Inc. ("PPFA") submit this brief in support of Respondents.[1] NAF, a not-for-profit professional association, was founded in 1977 and is composed primarily of clinics and physicians' offices providing reproductive health services, including abortion. Currently, NAF members include approxi-

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[1] The parties have consented to the filing of this brief. Their letters of consent are being filed with the Clerk of the Court.

mately 300 abortion providers[2] operating in 44 states, the District of Columbia, Puerto Rico and Canada. NAF's primary objective is to unite providers of abortion services into a professional community dedicated to quality care. NAF provides professional standards, guidelines, training and education to its members and serves as a clearinghouse for information and advice to abortion service professionals and the general public.

PPFA, a not-for-profit corporation organized in 1922, is the leading national voluntary health organization in the field of family planning. Currently, PPFA has 164 affiliates in 49 states operating approximately 919 family-planning clinics. Forty-three PPFA affiliates, as well as the national office, are also members of NAF. PPFA affiliates offer a wide range of services relating to reproductive health, including abortion. Sixty-nine PPFA affiliates, operating 117 clinics, offer abortion services as part of their program. All PPFA affiliates that do not provide abortion services themselves offer counseling and referral for such services.

NAF members and PPFA affiliates are the targets of antiabortion violence and intimidation in all parts of the nation. Accordingly, *amici* have obtained numerous injunctions limiting the unlawful activities of antiabortion protesters, including injunctions containing buffer zones like that entered below. *Amici* have a special concern that the Court be fully informed about the beneficial results of buffer zone injunctions, which effectively and constitutionally balance the interests of protesters, providers, patients and staff, as well as the communities in which they are located.

STATEMENT OF FACTS

Amici curiae refer to the Statement of Facts set forth in the Brief for Respondents filed with this Court.

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[2] Six applications for membership in NAF are currently pending.

SUMMARY OF ARGUMENT

The conduct that prompted the trial court to enter the Amended Permanent Injunction ("Injunction") is the same type of conduct that has confronted abortion providers throughout the country and the communities in which they are located. The Circuit Court of Florida, like other state and federal courts, was called upon to balance the First Amendment rights of those who oppose abortion with the rights of women seeking abortion to have safe access to medical services, the rights of abortion clinics to provide those services, and the needs of the communities to maintain public order. Many courts have undertaken this delicate task through the use of injunctions similar to the Injunction entered below, tailored to the particular facts of the cases before them.

Amici seek to demonstrate to this Court that these injunctions are reasonable time, place and manner restrictions that sensitively balance the competing interests of all concerned; that they are comparable to injunctive solutions successfully employed by courts in similar highly-charged situations outside the abortion context; and that the injunctions' coverage, which extends to all persons who act in concert with named parties, is a well-established and necessary means to ensure obedience to court orders.

ARGUMENT

I. COURTS ACROSS THE NATION HAVE SUCCESSFULLY USED BUFFER ZONE INJUNCTIONS TO CONTROL LAWLESS AND DISRUPTIVE CONDUCT AROUND ABORTION CLINICS

The facts that prompted the Respondents here to seek relief from the Florida courts mirror the facts that have propelled clinic operators and abortion-seeking women into the courts in other communities across America. Protests of quiet singing, praying or picketing intended to dissuade abortion-seeking women from exercising their constitutional right of choice have been intentionally mixed with lawless conduct and disruptive activities that frequently evolve into major assaults on the public health, welfare, safety and order. *See Northeast Women's Center, Inc. v. McMonagle*, 939 F.2d 57, 62-64 (3d Cir. 1991); *New York State National Organization for Women v. Terry*, 886 F.2d 1339, 1362-64 (2d Cir. 1989), *cert. denied*, 495 U.S. 947 (1990); *Portland Feminist Women's Health Center v. Advocates for Life, Inc.*, 859 F.2d 681, 686-87 (9th Cir. 1988); *Pro-Choice Network v. Project Rescue Western New York*, 799 F. Supp. 1417, 1423-24 (W.D.N.Y. 1992), *motion to vacate denied*, 828 F. Supp. 1018 (W.D.N.Y. 1993); *Women's Health Care Services, P.A. v. Operation Rescue-National*, 773 F. Supp. 258, 261 (D. Kan. 1991); *Planned Parenthood Ass'n of San Mateo County v. Holy Angels Catholic Church*, 765 F. Supp. 617, 625-26 (N.D. Cal. 1991); *Cousins v. Terry*, 721 F. Supp. 426, 431-32 (N.D.N.Y. 1989); *Town of West Hartford v. Operation Rescue*, 726 F. Supp. 371, 373-75 (D. Conn. 1989), *vacated and remanded*, 991 F.2d 1039 (2d Cir.), *cert. denied*, 114 S. Ct. 185 (1993); *National Organization for Women v. Operation Rescue*, 726 F. Supp. 1483, 1488-90 (E.D. Va. 1989), *aff'd*, 914 F.2d 582 (4th Cir. 1990), *rev'd in part on other grounds sub nom. Bray v. Alexandria Women's Health Clinic*, 113 S. Ct. 753 (1993); *Planned Parenthood of Mid-Iowa v. Maki*, 478 N.W.2d 637, 639 (Iowa 1991) (per curiam); *Planned*

Parenthood League of Massachusetts, Inc. v. Operation Rescue, 550 N.E.2d 1361, 1370-71 (Mass. 1990); *Planned Parenthood Ass'n of Cincinnati, Inc. v. Project Jericho*, 556 N.E.2d 157, 160 (Ohio 1990); *Federal Way Family Physicians, Inc. v. Tacoma Stands Up For Life*, 721 P.2d 946, 947 (Wash. 1986).

When called upon to intervene in these situations, courts have properly relied upon their injunctive powers to stop the illegal and disruptive conduct and to establish clear lines of demarcation between women seeking medical services and those providing the services, and those who oppose abortion. As the following examples demonstrate, these injunctions have succeeded in balancing the competing rights of all involved: women have obtained medical services, the public order has been maintained, and legal protests have continued.

A. San Mateo, California

Planned Parenthood of San Mateo County operates seven reproductive health clinics, three of which provide abortions in San Mateo, Redwood City and Daly City. All three clinics are now protected by injunctions.

The San Mateo clinic provides a wide variety of reproductive health care services including first trimester abortions. Although a handful of persons had picketed the clinic for years, by 1992 their numbers had grown substantially and there was an increase in the level of hostility and aggression of the demonstrators. The protesters would shadow patients as soon as they arrived in their cars. They would thrust antiabortion literature into open car windows and wait for the patient to exit the car. They would then follow the patient en masse to the clinic entrance, all the while screaming that the woman should not allow her baby to be killed.[3] In the spring of 1992,

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[3] *See also Bering v. SHARE*, 721 P.2d 918, 923 (Wash. 1986), *cert. dismissed*, 479 U.S. 1050 (1987) (court found "counseling" had been forced where clinic demonstrators threatened and screamed at patients refusing to take their literature and accused patients of killing babies).

the clinic was granted injunctive relief in federal court; that injunction was replaced by a preliminary injunction in state court in the fall of 1993. *Planned Parenthood Ass'n of San Mateo County v. Operation Rescue*, No. 384995 (Super. Ct., San Mateo County, Cal. Nov. 9, 1993), App. 1a.[4] The injunction reaches "any persons in active concert or participation" with the named defendants. App. 2a. It requires such persons to remain at least 15 feet from the clinic property line, which effectively places them across the street from the facility and creates a buffer zone between the enjoined protesters and patients. The protesters must also refrain from making any noise that is audible in the clinic once the doors are closed. App. 3a.

Prior to the creation of a buffer zone, the patients were considerably stressed by the confrontational and threatening activities of the screaming protesters, thus increasing the risks of medical complications.[5] Escorting companions, understandably concerned about the health and wellness of the patient, would often respond with equal hostility to the tauting antiabortion activists, thus increasing the risks for violence.[6] Clinic personnel would also experience stress, distraction and disruption as they attempted to deliver surgical services to their patients.

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[4] Copies of the unreported decisions cited by *amici* are reproduced in the Appendix to this brief.

[5] *See also Holy Angels Catholic Church*, 765 F. Supp. at 620 ("protestors' conduct causes plaintiff's patients and staff extreme emotional distress. . . . [P]atients are often so upset by the picketers' conduct that they are forced to reschedule their appointments, requiring more advanced, and therefore more dangerous, medical procedures.").

[6] *See also Southwestern Medical Clinics of Nevada, Inc. v. Operation Rescue*, 744 F. Supp. 230, 232 (D. Nev. 1989) (protesters "verbally and physically harassed [clinic's] patients and employees as well as those who act as escorts"; hostility escalated to a point where physical confrontation is likely); *Town of West Hartford*, 726 F. Supp. at 374 (protests caused one clinic employee to suffer an anxiety attack and four employees to quit due to fear generated by the protests).

The buffer zone now prevents intimidation of patients, companions and clinic staff. Although arriving patients can still see and hear the protesters, they are no longer fearful of being harassed and the potential for violence has greatly decreased. Moreover, clinic staff are able to attend to normal clinic operations. At the same time, law enforcement officials are especially pleased by the new calm now surrounding the facility. Demonstrators understand their boundaries and remain within them. In fact, while the protests continue, no arrests have been necessary since the injunction went into effect.

B. Duluth, Minnesota

The Women's Health Center of Duluth is the only provider of first trimester abortions in the state of Minnesota outside of the Twin Cities area of St. Paul-Minneapolis. As such, it services women from 24 counties within the state as well as several in Wisconsin, Michigan and Canada. In addition to abortion services, the clinic offers family planning, gynecological care, testing for sexually transmitted diseases, contraceptive services and breast and cancer screenings.

Ever since the clinic opened, a persistent and small group of protesters has regularly paced the sidewalk outside the clinic with posters decrying abortion. These protests were peaceful, orderly and nonthreatening to arriving patients. In 1992, however, a group of demonstrators from outside the Duluth community began targeting the clinic. These protesters were much more aggressive and hostile in their behaviors.

The new band of demonstrators was not content to march with picket signs and pass out antiabortion literature. Instead, the protesters rushed at the patients as soon as they would alight from their cars. In touching and grabbing confrontations, they would thrust plastic fetuses at the women and scream at them to not let the "butcher suck your baby out limb by limb."[7] For some

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[7] *See also Pro-Choice Network*, 799 F. Supp. at 1424-25 (the demonstrators, who often became "angry and frustrated" would

women who had driven as many as eight hours to reach the clinic, the sight of shouting protesters with graphic, massive signs reaching for them as they tried to get out of their cars was overwhelming.[8]

The clinic sought and obtained an injunction against these protesters and those acting in concert with them. *Women's Health Center v. Operation Rescue*, No. C0-93-601157 (Dist. Ct., St. Louis County, Minn. June 16, 1993), *appeal pending*, No. C9-93-1776 (Minn. Ct. App.), App. 4a. Under its terms, the defendants and "persons acting in concert or participation with Defendants who receive notice of [the] Injunction" may not engage in protest activities within 100 feet of the clinic property lines. App. 4a-5a. Although the buffer confines the enjoined defendants to protesting across the street from the clinic, they remain in full eyesight and earshot of the clinic's invitees. Now, however, the women are able to enter the clinic without increased levels of stress and intimidation. Further, all the protesters, patients, clinic personnel and the police now know who and what type of activity is prohibited outside the clinic. There have been no violations of the injunction.

C. Fargo, North Dakota

From the day that Fargo's only full service reproductive health care clinic opened in October 1981, anti-

"crowd around people trying to enter the facilities in an intimidating and obstructing manner, and grab, push and shove the patients, patient escorts and staff"); *Holy Angels Catholic Church*, 765 F. Supp. at 619 ("defendants have unlawfully attempted to intimidate women into abandoning planned abortion, . . . shoving plastic replicas of fetuses into the faces and cars of clinic staff and patients, as well as other action which transcends the rights of peaceful protest, assembly and free speech").

[8] *Cf. Northeast Women's Center, Inc. v. McMonagle*, 745 F. Supp. 1082, 1090 (E.D. Pa.) (Assistant DA who witnessed a demonstration testified that " 'demonstrators' activity rose to a "frenzy" and that he delayed leaving the [clinic] out of fear for his physical safety' " (citation omitted)), *modified*, 749 F. Supp. 695 (E.D. Pa. 1990), *aff'd as modified and remanded in part*, 939 F.2d 57 (3d Cir. 1991).

abortion protests began. However, by March 1991, after several clinic invasions, the clinic found it necessary to secure a court-ordered injunction which limited protests to 100 feet from the clinic's property lines. *Fargo Women's Health Organization, Inc. v. Lambs of Christ*, Civil No. 91-1953 (Dist. Ct., Cass County, N.D. Sept. 17, 1992), App. 7a, 9a.

The protest scene at the clinic, prior to obtaining the buffer zone, was chaotic. Demonstrators would physically attack approaching vehicles or throw their bodies under the wheels. Some arriving patients would worry about hitting the protesters and would just continue driving past the clinic. Those patients brave enough to attempt clinic entry were surrounded by the protesters and taunted with antiabortion messages until they were able to access the building.[9] The building itself, a converted wood frame house, could not block out the excessive noise made by the demonstrators. Thus, while women waited for their procedures and underwent anesthesia, and while doctors performed surgery, constant shouts of "stop murdering your baby" would pierce the walls of the clinic.[10]

[9] *See also Cousins v. Terry*, 721 F. Supp. at 432 (many women who succeeded in getting past demonstrators into the clinic "were traumatized by the ordeal of having to be escorted past and over demonstrators who frequently shouted insulting epithets").

[10] *See also Pro-Choice Network*, 799 F. Supp. at 1425 (the voices of the protesters were so loud, and sometimes accompanied by use of bullhorns, that the noise reached patients already inside the clinic and "disturb[ed] the quiet environment necessary for providing safe and efficacious health care"); *Holy Angels Catholic Church*, 765 F. Supp. at 621; *Northeast Women's Center*, 745 F. Supp. at 1090 (" 'the sound of chanting, amplified by bullhorns, was audible in the [clinic's] operating room . . . [and] put patients "under considerably greater stress," especially when going or coming out of general anesthesia' " (citation omitted)); *Planned Parenthood of Monmouth County, Inc. v. Cannizzaro*, 499 A.2d 535, 537 (N.J. Super. Ct. Ch. Div. 1985), *aff'd*, 526 A.2d 741 (N.J. Super. Ct. App. Div. 1987); *Planned Parenthood Ass'n of Cincinnati*, 556 N.E.2d at 160.

Fargo police officials have welcomed the injunction. Before there were clear lines of demarcation between the protesters, patients, escorts and staff, the police found it difficult to determine who was in legitimate need of clinic access and who was involved in intimidation and harassment. An officer testified at trial that " 'law enforcement has a need for [this 100-foot] distance to effectively react to the crowds' and 'to effectively control the area and maintain peace and order and . . . access to the premises.' " *Fargo Women's Health Organization, Inc. v. Lambs of Christ*, 502 N.W.2d 536, 537 (N.D. 1993) (citation omitted).

Before the buffer zone, the City of Fargo had a detail of police officers with daily assignments to keep order at the clinic. Since the creation of the buffer zone, there is no longer a need for continual surveillance, despite continuing protests, and the police are rarely called to the clinic.

D. Jersey City, New Jersey

The Horizon Health Center is located in a commercial section of an inner city neighborhood in Northern New Jersey. A full service facility, it provides family planning, prenatal care, well-baby care and educational counseling. On Saturdays, it performs first trimester abortions as well as glucose testing for pregnant women. For many years, a small group would engage in visible, audible and peaceful protest from a site across the street from the facility.

By the fall of 1991, however, the number of protesters had increased and they moved their activities to the clinic's side of the street where the sidewalk is only 12 feet in width and the clinic doors open directly onto it. As the picketers would march in a huge elliptical circle, the patients would have no clear access from the street to the clinic's front door.[11] Some women were undaunted

[11] *See also Pro-Choice Network*, 799 F. Supp. at 1424 (court found that method and manner of picketers forced patients to

by the demonstrations and would break the picket line to gain clinic entry. Many other women, particularly those who were young, immigrant or otherwise vulnerable, would return home and call the clinic stating their fear of encountering the protesters. Members of the clinic staff would then go to their homes and personally escort the women back to the clinic.[12]

Clinic personnel increasingly found it necessary to summon the police to the scene in order to open sidewalk access for the patients. As soon as the police would leave, however, the picketers would resume blocking the clinic entrance. On one occasion, a crowd of approximately 150 demonstrators stationed themselves on the narrow sidewalk immediately outside the clinic and began singing, chanting, shouting into the clinic with a megaphone, and "sidewalk counseling" with advice that the women should not enter the clinic because "they will tear the arms and legs off your baby." [13]

The police erected a barricade on the narrow sidewalk and directed the protesters to stand behind it. While this solution created a small corridor of passage for persons seeking to enter the facility, the narrow sidewalk could not hold the large number of protesters massed behind the barricade.[14] Thus, the demonstrators spilled out onto

"run a gauntlet of harassment and intimidation" and constituted a "constructive blockade").

[12] *Cf. Holy Angels Catholic Church*, 765 F. Supp. at 620-21 ("Plaintiff has been forced to obtain the services of volunteer escorts to shuttle patients between their cars and the clinic because of the aggressive and invasive protesting.").

[13] *See also Women's Health Care Services*, 773 F. Supp. at 261 (by "sidewalk counseling" protesters "seek[] to abuse, harass, or intimidate women patients . . . so that they do not enter the . . . clinics").

[14] *Cf. NOW v. Operation Rescue*, 726 F. Supp. 300, 303 (D.D.C. 1989) (police testified that "protestors would breach police barricades despite the use of such non-violent methods as saw horses, tape, metal barricades, and human chains of police officers").

the street and caused traffic to detour.[15]

The clinic sued for injunctive relief in order to prevent future protests of this nature. The trial court, after a full hearing, granted the clinic's request and, among other things, ordered a buffer zone which placed the demonstrators where they had been originally, across the street from the clinic. *Horizon Health Center v. Felicissimo*, 622 A.2d 891 (N.J. Super. Ct. App. Div.), *cert. granted*, 634 A.2d 527 (N.J. 1993). The injunction covers an individual, the defendant organization, Helpers of God's Precious Infants, as well as "persons . . . acting in concert or combination" with the defendants. *Id.* at 896. Since the court's order, protests continue at Horizon. However, the demonstrators have complied with its terms, and women have gained safe access to medical services without incident.

E. Chamblee, Georgia

The Northside Women's Clinic is a licensed ambulatory outpatient surgical facility which also provides abortion services. The clinic is located on a curved four-lane road in Chamblee, Georgia, a small incorporated suburb of Metropolitan Atlanta. While the population of Chamblee is less than 5,000 people, this small town, as well as the owner, patients, staff and neighbors of the Northside Women's Clinic, has become all too familiar with the phenomenon of the unruly antiabortion protest.

For several years, antiabortion demonstrations with as few as 10 and as many as 500 protesters had been the norm at the clinic. The protesters would stand in either

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[15] *See also Planned Parenthood Ass'n of Cincinnati, Inc. v. Project Jericho*, Nos. C-860550, C-860659, C-870015, C-860580, C-860577, C-860878, C-860825, C-870086, C-870150, C-870757, 1989 WL 9312, at *3 (Ohio Ct. App. Feb. 8, 1989) (court found sidewalk continuously blocked by groups of picketers standing about or moving in a continuous line so no one could pass by, forcing people to walk in the street), *aff'd*, 556 N.E.2d 157 (Ohio 1990).

of two clinic driveways and block access to the facility. There, they would picket with huge signs and use bullhorns to shout epithets at arriving patients. Invariably, these protesters would also stand in the curved public roadway outside the clinic. Motorists unable to see around the curve would be startled at the sudden sight of demonstrators in the street. Moreover, the large signs held by the demonstrators also blocked the vision of drivers attempting to exit the clinic's driveways. Indeed, the street outside the Northside Women's Clinic was the site of several minor vehicular accidents during times of abortion protests.[16]

Sometimes protesters would jump on the hoods of the cars, bang on the car windows and scream at the patients not to visit the "baby killer." On several occasions, the protesters would mount the hood of the owner-physician's pick up truck, form their hands in the shape of a pistol and declare "you're next."

The protesters would engage in these activities despite the patient's reason for business. Thus, even elderly Medicare patients visiting the clinic for gynecological services would be verbally harassed by the demonstrators.[17] The clinic's neighbor, an automotive refinishing business, was also affected by the protests. Zealous demonstrators would trespass on the neighbor's property and climb trees there in order to shout over a common wall at the women

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[16] *See also Women's Health Care Services*, 773 F. Supp. at 269 ("protests . . . do not involve mere trespass upon the private property of the [clinic], but upon the property of neighbors, as well as the blocking of public streets and thoroughfares and the hinderance of legal traffic upon those streets").

[17] *Cf. Bering v. SHARE*, 721 P.2d at 923 (patient who was miscarrying a wanted pregnancy and bleeding heavily had to force her way through a group of picketers to reach her nurse and wheelchair; court found that picketers obstructed passage of visitors and staff at medical building).

entering the clinic.[18] The Chamblee Police Department was ill-equipped to handle these demonstrations. With less than six officers assigned per shift to cover the entire town, they were dramatically outnumbered during any large protest at the clinic.

In December 1992, the clinic obtained a permanent injunction with various restrictions including prohibiting protesters from coming within 10 feet on either side of the clinic's two driveways, and from placing signs within the area of the buffer. *James Gay, M.D. v. Nancy Kuehl, et al.*, No. 91-10869-9 (Super. Ct., DeKalb County, Ga. Dec. 11, 1992), App. 12a, 14a. According to the issuing court, the protest situation at the clinic "presents a classic case of the rights of the Plaintiffs to operate a lawful, licensed business and medical facility and the rights of clinic patients to obtain desired medical services colliding with the Defendants' Constitutional rights of freedom of speech and freedom of assembly. *A balance is necessary to preserve the rights of all.*" App. 13a (emphasis added).

Since the injunction was entered, a sense of calm and order has been restored to the neighborhood outside the clinic. Except for the driveway areas protected by the buffer zones, protests continue on the right-of-way abutting the clinic and arriving patients do not escape the antiabortion message. At the same time, the patients are now free to enter and exit the medical facility as they would any other legitimate business in Chamblee. Before buffer zone relief, the town's local police department was consistently overwhelmed by the demonstrations. With buffer zone protection in place, they are rarely called to

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[18] *See also Women's Health Care Services*, 773 F. Supp. at 269 (protests spilled over to the private property of the neighbors); *cf. Southwestern Medical Clinics of Nevada*, 744 F. Supp. at 232 (protesters "have congregated in such numbers on the sidewalks and in the parking lots . . . so as to prevent customers of tenants unrelated to Plaintiffs' clinics from entering and leaving said facilities").

the clinic and, when that occurs, there are clear boundary lines established which help them easily to enforce the terms of the injunction.

II. BUFFER ZONE INJUNCTIONS ARE A WELL-ESTABLISHED REMEDY FOR RESTORING PEACE AND ORDER IN DISPUTES OUTSIDE THE ABORTION CONTEXT

Buffer zone injunctions, as well as similar statutorily-imposed restrictions, have been utilized in a variety of contexts outside the abortion sphere. For example, buffer zones have been widely used to establish order in labor disputes. *See M Restaurants, Inc. v. San Francisco Local Joint Executive Board of Culinary Workers, etc.*, 177 Cal. Rtpr. 690, 694 (Cal. Ct. App. 1981) (upholding 10-foot buffer zone and limits on number and spacing of pickets around restaurant and cocktail lounge to control mass picketing, blocking of entrance, loud pejorative statements about the establishment and anonymous threats to employees); *International Molders and Allied Workers Union v. Superior Court*, 138 Cal. Rptr. 794, 800-01 (Cal. Ct. App. 1977) (upholding contempt charges for violating temporary restraining order allowing two pickets within 20 feet of entrance to or exit from iron works after threats of violence and interference with access and freedom of movement); *California Retail Liquor Dealers Ass'n v. United Farm Workers of America*, 129 Cal. Rptr. 407, 408 (Cal. Ct. App. 1976) (upholding buffer zone barring picketing and limiting number of picketers within six feet of retail liquor stores to control blockage of store entrance and physical abuse and intimidation of patrons); *Reeves v. Moreland*, 577 S.W.2d 125, 126-27 (Mo. Ct. App. 1979) (upholding criminal contempt convictions of strikers who violated injunction barring picketing within 100 yards of refrigerator manufacturer to control mass picketing that blocked ingress and egress to property); *Makro, Inc. v. United Food & Commercial Workers Union*, 581 N.E.2d 1143, 1144 (Ohio Ct. App.

1989) (upholding 25-foot buffer zone and limitation on number of picketers around retail warehouse to control mass picketing, litter and noise disturbance); *Nashville Corp. v. United Steelworkers of America*, 215 S.W.2d 818, 819-20 (Tenn. 1948) (upholding contempt convictions of picketers who violated injunction forbidding union members to congregate within 100 yards of employers' plant to control mass picketing, violence and threats of violence).[19]

So, too, have non-injunctive buffer zones long been found constitutional by this Court and others. *See Burson v. Freeman*, 112 S. Ct. 1846 (1992) (plurality opinion) (polling places); *Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640 (1981) (public fairgrounds); *NLRB v. Baptist Hospital, Inc.*, 442 U.S. 773 (1979) (health care facilities); *Grayned v. City of Rockford*, 408 U.S. 104 (1972) (public school); *Concerned Jewish Youth v. McGuire*, 621 F.2d 471 (2d Cir. 1980), *cert. denied*, 450 U.S. 913 (1981) (foreign mission).

As recently as 1992, this Court upheld a 100-foot "campaign-free zone" surrounding polling sites on election day. *Burson v. Freeman*, 112 S. Ct. at 1851, 1858. *Burson* addressed the question of governmental " 'power to regulate conduct in and around the polls in order to maintain peace, order and decorum there.' " *Id.* at 1848 (citation omitted). This Court upheld the constitutionality of the Tennessee law, notwithstanding the fact that it was a facially content-based restriction on political speech in a public forum. *Id.* at 1851.[20]

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[19] Indeed, in the labor context, this Court has upheld the constitutionality of injunctions banning picketing altogether when the picketing becomes enmeshed with "violent conduct which is concededly outlawed." *Milk Wagon Drivers Union v. Meadowmoor Dairies Inc.*, 312 U.S. 287, 292 (1941).

[20] *Amici* do not in any way concede that the Injunction in issue is a content-based restriction.

After an extensive analysis of the long history of election fraud and intimidation at polling places and the beneficial effects of state buffer zones, *id.* at 1852-55,[21] this Court accepted Tennessee's compelling interests for the statute—(1) protecting an individual's right to vote for the candidate of his or her choice and (2) ensuring the election is held with "integrity and reliability." *Id.* at 1851. In contrast, this Court rejected respondent's argument that the buffer zone was overinclusive because Tennessee could serve the same compelling interests with statutes criminalizing intimidation and interference with elections. *Id.* at 1855. As Justice Blackmun stated, such laws " 'deal with only the most blatant and specific attempts' to impede elections," and fail to permit detection of many "undetected or less than blatant acts [that] may nonetheless drive the voter away." *Id.*

The parallels between this case and *Burson* are compelling. Both cases concern interference with a fundamental right under the guise of "free speech." Both cases involve issues of harassment, intimidation and violence. Both cases rely upon a buffer zone to ensure that individuals are free to exercise the fundamental right in question, even though already-existing laws may prohibit the most blatant examples of the unlawful conduct.

Other decisions of this Court outside the abortion context also support the legitimacy of a buffer zone to protect the clinic and its patients from the harassment they suffer from the demonstrators. *Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640 (1981); *Grayned v. City of Rockford*, 408 U.S. 104 (1972). In *Heffron* and *Grayned*, this Court considered the character of the public forum where the "speech" occurred—the former a crowded public fairground and the latter a

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[21] The effectiveness of the buffer zones at the polls corresponds to the peaceful and orderly conditions resulting from such zones at clinics around the country. *See supra* pp. 6-7, 8, 10, 12, 14-15.

public school—and upheld the buffer zones based largely on the nature of the location.

Indeed, this Court has explicitly recognized the special nature of a health care facility in challenges to restrictions on "speech." For example, in *Carey v. Brown*, 447 U.S. 455 (1980), the Court stated that the Constitution does not forbid government protection of the public from the " 'boisterous and threatening conduct that disturbs the tranquility of . . . public and other buildings that require peace and quiet to carry out their functions, such as courts, libraries, schools, and *hospitals*.' " *Id.* at 470-71 (emphasis added) (citation omitted).

This Court also relied on the effect on patients and their care when examining a hospital ban on labor solicitation by employees in various places in the facility. The Court held that such a prohibition was acceptable in areas associated with patient care. *NLRB v. Baptist Hospital, Inc.*, 442 U.S. 773 (1979). As Justice Blackmun observed,

> "Hospitals, after all, are not factories or mines or assembly plants. They are hospitals, where human ailments are treated, where patients and relatives alike often are under emotional strain and worry, where pleasing and comforting patients are principal facets of the day's activity, and where the patient and his family . . . need a restful, uncluttered, relaxing, and helpful atmosphere, rather than one remindful of the tensions of the marketplace in addition to the tensions of the sick bed."

Id. at 783 n.12 (citation omitted). These same considerations apply to the Aware Woman Center for Choice, Inc. ("Aware Woman Center"). The buffer zone created by the Florida court seeks to promote the tranquillity crucial to the patient care rendered at the clinic, particularly in light of the trial court's finding that showed an increase in medical complications due to disturbances and noise around the clinic. J.A. 54.

The buffer zone concept has a long history outside the abortion context. This technique is not a recent innovation in First Amendment law. It is an accepted method of maintaining peace and order in volatile environments, and one that has been recognized as constitutional by this Court and many others. Thus, well-established precedent supports the creation of buffer zones outside the abortion setting to control lawless conduct similar to, or even far less egregious than, that occurring outside Aware Woman Center.

III. NONPARTIES ACTING IN CONCERT WITH NAMED DEFENDANTS HAVE TRADITIONALLY BEEN BOUND BY THE TERMS OF AN INJUNCTION

Recognizing that an injunction's terms can easily be evaded if defendants are permitted to encourage nonparties to do what the injunction forbids, both state and federal courts routinely utilize "acting in concert" provisions to bind nonparties with notice of the injunction. This long-accepted practice not only is constitutional, but also is necessary to ensure the integrity of court orders.

A. The Florida Rules Of Civil Procedure, The Federal Rules Of Civil Procedure, And The Common Law All Permit Courts To Bind Nonparties Acting In Concert With Named Defendants

Petitioners Madsen, Martin and Hobbs, each of whom is a named party to the Injunction, dispute the constitutionality of the trial court's order enjoining

> Operation Rescue, Operation Rescue America, Operation Goliath, their officers, agents, members, employees and servants, and Ed Martin, Bruce Cadle, Pat Mahoney, Randall Terry, Judy Madsen, and Shirley Hobbs, and *all persons acting in concert or participation with them*, or on their behalf, with notice in any manner or by means of this order.

J.A. 56-57 (emphasis added). The "in concert with" language derives from Fla. R. Civ. P. 1.610(c), which, like its federal counterpart,[22] provides:

> Every injunction . . . shall be binding on the parties to the action, their officers, agents, servants, employees, and attorneys and on those persons in active concert or participation with them who receive actual notice of the injunction.

At the time of its adoption in 1938, Fed. R. Civ. P. 65(d) reflected prevailing common-law doctrine, which held

> that a decree of injunction not only binds the parties defendant but also those identified with them in interest, in "privity" with them, represented by them or subject to their control. In essence it is that defendants may not nullify a decree by carrying out prohibited acts through aiders and abettors, although they were not parties to the original proceeding.

Regal Knitwear Co. v. NLRB, 324 U.S. 9, 14 (1945). Thus, federal court and state court injunctions routinely bind nonparties who have received actual notice and are acting in concert with the named parties.[23]

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[22] Fla. R. Civ. P. 1.610 has been "extensively amended so that it is similar to Federal Rule of Civil Procedure 65." Committee Notes on 1980 Amendment to Rule 1.610.

[23] *See, e.g., Golden State Bottling Co. v. NLRB*, 414 U.S. 168, 177-81 (1973); *New York State National Organization for Women v. Terry*, 961 F.2d 390, 397-98 (2d Cir. 1992), *vacated on other grounds sub nom. Pearson v. Planned Parenthood Margaret Sanger Clinic*, 113 S. Ct. 1233, *judgment reinstated*, 996 F.2d 1351 (2d Cir. 1993) (per curiam); *Aradia Women's Health Center v. Operation Rescue*, 929 F.2d 530, 533 (9th Cir. 1991); *Coca-Cola Co. v. Overland, Inc.*, 692 F.2d 1250, 1255-56 (9th Cir. 1982); *Lance v. Plummer*, 353 F.2d 585, 591 (5th Cir. 1965), *cert. denied*, 384 U.S. 929 (1966); *Marshall v. Blasters, Drillrunners, and Miners Union*, 30 Fed. R. Serv. 2d 866 (S.D.N.Y. 1980); *South Central Bell Telephone Co. v. Constant, Inc.*, 304 F. Supp. 732, 735-36 (E.D. La. 1969), *aff'd*, 437 F.2d 1207 (5th Cir. 1971); *Royal News Co. v. Schultz*, 230 F. Supp. 641, 643-45 (E.D. Mich. 1964), *modified*, 350 F.2d 302 (6th Cir. 1965); *Ex parte Richardson*, 380 So. 2d 831, 832 (Ala. 1980); *Walker v. City of Birmingham*, 181 So. 2d 493, 503 (Ala. 1965), *aff'd*, 388 U.S. 307 (1967); *Mechanic v. Gruensfelder*, 461 S.W.2d 298, 307-08 (Mo. Ct. App. 1970) (per curiam); *Crozer-Chester Medical Center v. May*, 531 A.2d 2, 5-6 (Pa. Super. Ct. 1987), *appeal dismissed*, 550 A.2d 196 (Pa. 1988); *Neshaminy Water Resources Authority v. Del-Aware Unlimited, Inc.*, 481 A.2d 879, 883-84 (Pa. Super. Ct. 1984); *Vermont Women's Health Center v. Operation Rescue*, 617 A.2d 411, 413-14 (Vt. 1992).

The reach of the Injunction, which is limited by the "in concert with" language, does not extend, as Petitioners argue, to anyone espousing an antiabortion viewpoint. While in this particular case, as is true much of the time, individuals acting in concert with named defendants may share a particular viewpoint—opposition to abortion—the police here have been ordered to arrest, not on the basis of viewpoint, but only on a good faith belief that the individuals are acting in concert with or participating with the named defendants to violate the terms of the Injunction. Moreover, this Court has already recognized that a buffer zone restriction can be tailored to reach only the conduct that causes the problem. *See Burson v. Freeman*, 112 S. Ct. at 1856. As Justice Blackmun emphasized, "States adopt laws to address the problems that confront them. The First Amendment does not require States to regulate for problems that do not exist." *Id.*

B. The Need To Bind Nonparties To An Injunction Is Heightened When Protesters Are Numerous Or Difficult To Identify

Recalcitrant antiabortion protesters across the nation provide the quintessential example of why courts must bind nonparties to injunctive decrees. Antiabortion protests attract large crowds of people that are not easily identified. *See, e.g., Roe v. Operation Rescue*, 919 F.2d 857, 862 (3d Cir. 1990) (police arrested over 900 peo-

ple during demonstrations); *New York State National Organization for Women v. Terry*, 732 F. Supp. 388, 393 (S.D.N.Y. 1990) (police arrested several hundred demonstrators during the demonstrations). Demonstrations at Aware Woman Center were no different. The court found that anywhere between a handful to 400 protesters converged upon Aware Woman Center, one to three times a week. J.A. 51.

Antiabortion activists often distribute flyers encouraging others to join them in protests at a specified clinic. *See, e.g., Northeast Women's Center v. McMonagle*, 745 F. Supp. 1082, 1093, *modified*, 749 F. Supp. 695 (E.D. Pa. 1990), *aff'd as modified and remanded in part*, 939 F.2d 57 (3d Cir. 1991) ("as part of this 'campaign,' defendants organized and solicited others to join in what defendants have referred to as a series of 'rescues' "). As neither clinic operators nor police know the names of those in attendance at the antiabortion protest, it is impossible to name with specificity or certainty all potential defendants prior to obtaining an injunction. The rules governing injunctions, however, obviate the need to name all parties through the use of "in concert with" provisions. As the Vermont Supreme Court reasoned, binding nonparties was necessary to prevent a situation where " 'any groups bound on violating the rights of others . . . [could] effectively defeat the power of the courts' by continually changing the persons acting against the injunction." *Vermont Women's Health Center v. Operation Rescue*, 617 A.2d 411, 414 (Vt. 1992) (quoting *Bratton v. MGK, Inc.*, 587 N.E.2d 134, 137 (Ind. Ct. App. 1992)).

The inability of plaintiff clinics to identify all possible defendants in an injunction suit is compounded by the protesters' widespread refusal to provide their true names following arrest, instead giving such pseudonyms as "John Doe." *See, e.g., Bratton v. MGK, Inc.*, 587 N.E.2d 134, 135 (Ind. Ct. App. 1992); *State v. Franck, aka John Doe 632*, 499 N.W.2d 108 (N.D. 1993); *see also* Tanya Barrientos, *Jail Keeps 'Nameless' Abortion Foes,*

Philadelphia Inquirer, July 31, 1988, at A4; *The 80% Majority Campaign*, Vol. 3, No. 8, The Campaign Report, at 1 (Aug. 15, 1988).[24] Protesters employ this tactic to avoid a finding that they acted in concert with the named defendants. Indeed, in this very case, just two days after the Injunction was issued, approximately 50 protesters were arrested at Aware Woman Center, and many of the arrestees used the pseudonym "John Doe." *See* Pet. Br. at 11; Pet. for Writ of Cert. at 8 n.7. This tactic again highlights the necessity of using "in concert with" provisions to bind nonparties.

Gutting the "in concert with" provisions, as Petitioners urge, will make injunctions against crowds of antiabortion protesters impossible to enforce. As it is, court orders against antiabortion protesters are repeatedly violated,[25] and a common defense to charges of contempt is that the alleged contemner was not acting in concert with the named parties. *See, e.g., Aradia Women's Health Center v. Operation Rescue*, 929 F.2d 530, 533 (9th Cir. 1991); *Roe v. Operation Rescue*, 919 F.2d at 871-72; *New York State National Organization for Women*, 732 F. Supp. at 404-09; *Bratton v. MGK, Inc.*, 587 N.E.2d at 136-37; *Crozer-Chester Medical Center v. May*, 531 A.2d 2, 5-6

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[24] Copies of these materials are being lodged with the Clerk of the Court.

[25] *See, e.g., Roe v. Operation Rescue*, 919 F.2d at 862 ("In spite of the TRO, defendants carried out their planned 'rescue missions' " on three separate days); *NOW v. Operation Rescue*, 747 F. Supp. 772, 775 (D.D.C. 1990) (defendants violated the permanent injunction during three days of protests); *Northeast Women's Center*, 745 F. Supp. at 1085-86 (each of the 24 defendants found liable for trespass had entered the premises of the clinic on at least one and as many as three occasions; furthermore, the court noted that there was no evidence that the defendants' unlawful activities would cease and, in fact, the evidence suggested the opposite); *New York State National Organization for Women v. Terry*, 732 F. Supp. at 393-95 (defendants violated TRO on three separate occasions and violated subsequent permanent injunction on at least eight separate occasions).

(Pa. Super. Ct. 1987); *Vermont Women's Health Center*, 617 A.2d at 413-14; *cf. State v. Franck, aka John Doe 632*, 499 N.W.2d at 111. These cases perfectly illustrate the due process protections embodied by the "in concert with" language. Unless the court makes an evidentiary finding that a nonparty is acting in concert with the named parties, the nonparty is not bound by the injunction and cannot be held in contempt.

Given the amorphous and varied activities of anti-abortion protesters and the large number of unidentified participants, it is essential for courts to be able to deter unnamed parties from thwarting the effectiveness of the court's order. As explained by one of the many courts that have confronted the problems created by clinic blockades:

> [I]f this Court refused to enjoin those individuals who join in active concert with the defendants and who participate in non-peaceful activity through the defendants' invitation, the injunction would essentially be sapped of its strength. . . .
>
> Thus, I conclude that enjoining merely the activities of the named defendants will be wholly insufficient to protect plaintiff and its staff and patients from the continued harassment, assaults and intimidation, which they have regrettably endured and will, inevitably, continue to endure unless a more complete injunction is issued.

Northeast Women's Center, 745 F. Supp. at 1093-94.

CONCLUSION

Buffer zone injunctions have been used by numerous courts to restore peace and order to the turbulence surrounding abortion clinics across the nation. These injunctions permit protesters to engage in protected First Amendment activity while controlling the lawless conduct that often accompanies antiabortion demonstrations. Thus, buffer zone injunctions effectively balance the rights of protesters with the rights of patients seeking

safe access to medical services, the rights of abortion clinics to provide these services, and the needs of the communities to maintain public order. These injunctions have been consistently upheld as reasonable time, place and manner restrictions.

The buffer zone Injunction upheld by the Supreme Court of Florida is well supported by the record and falls comfortably within long-established precedent recognizing the constitutionality of buffer zones in highly-disputed situations not limited to the abortion context. For the foregoing reasons, this Court should affirm the decision below of the Supreme Court of Florida.

Respectfully submitted,

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April 1, 1994

APPENDIX

APPENDIX

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN MATEO

Case No.: 384995

PLANNED PARENTHOOD ASSOCIATION OF SAN MATEO COUNTY, PLANNED PARENTHOOD ALAMEDA/SAN FRANCISCO and NADER OSTOVAR,

Plaintiffs,

v.

OPERATION RESCUE OF CALIFORNIA, YOUTH FOR AMERICA, KEN REED, JEFF WHITE, KATHRYN SHORT, BRYAN HOWARD LONGWORTH, MICHELLE RENEE MUELLER, DAGMAR MERARI TORRES, MIKE CURTIS POWELL, KIMBERLY ALVARENGA, MARY LEE SMEDLEY, DAVID DOUGLAS FULLER, DANIELLE ALFRED SILVA, JUDE FRANCIS VOS, PATRICK JOSEPH MCKENNA, MICHAEL CHRISTIAN ROSS, STANFORD ABNER WARNER, MARTIN MUNOZ, STEVE BUTLER, JOHN D. A. BRIDGES, and ROB COCHRAN,

Defendants.

ORDER AND PRELIMINARY INJUNCTION

This cause came on for hearing on September 21, 1993, and October 20, 1993, upon the *ex parte* application of plaintiffs Planned Parenthood Association of San Mateo County, Planned Parenthood Alameda/San Francisco, and Nader Ostovar for a preliminary injunction. Upon reading the memorandum of points and authorities submitted in support of and in opposition to the application, and having considered the declarations and evidence and heard the arguments of counsel, and good cause appearing therefor,

IT IS HEREBY ORDERED THAT:

In accordance with California Code of Civil Procedure sections 527 and 527.6, Rob Cochrane and Operation Rescue of California, and each of them, and their agents, employees, representatives, and any persons in active concert or participation with them, or any of them, and all persons with actual notice of this order shall:

(a) not threaten, strike or make physical contact with Dr. Ostovar or his family members;

(b) not keep Dr. Ostovar or his family members under surveillance;

(c) not follow Dr. Ostovar or his family members;

(d) not telephone Dr. Ostovar or his family members;

(e) not block Dr. Ostovar's or his family members' movements at home, in public places or thoroughfares, or on any property belonging to, leased or rented by Planned Parenthood;

(f) not take any photographs or videotapes of Dr. Ostovar, his family members, or any person accompanying or assisting him as he arrives or departs from his places of employment or home;

(g) stay at least 30 feet away from Dr. Ostovar and his family members; and

(h) stay at least 250 feet away from Dr. Ostovar's residence in San Mateo, California.

IT IS FURTHER ORDERED THAT:

In accordance with California Code of Civil Procedure section 527, Rob Cochrane and Operation Rescue of California, and each of them, and their agents, employees, representatives, and any persons in active concert or participation with them, or any of them, and all persons with actual notice of this order, are restrained and enjoined from directly or indirectly:

(a) Entering or blocking or obstructing any other person's ingress to or egress from Planned Parenthood's San Mateo Clinic, maintained and operated by plaintiff at 2211 Palm Avenue, San Mateo, California;

(b) Demonstrating, picketing, distributing literature, or counseling on Planned Parenthood's private property located at 2205 and 2211 Palm Avenue, San Mateo (including the walkway at the front of the clinic building, the walkways and driveways on either sides of the clinic building, and the parking area behind the clinic building), or within fifteen (15) feet of such private property;

(c) Entering or blocking or obstructing the ingress or egress of any vehicle to or from any parking area in front of or behind said Clinic;

(d) Obstructing or impeding the movement of any person between any vehicle and said Clinic, or of any person using the walkways leading to the front door of the clinic and along the south wall of the clinic building;

(e) Approaching any Planned Parenthood staff member, patient or companion once that person has made it unmistakably clear that he or she does not wish to be approached;

(f) Shouting, chanting, or otherwise producing loud noises which can be heard within said Clinic;

(g) Physically touching, threatening to physically touch, or shouting at any individual entering or leaving said Clinic.

IT IS SO ORDERED.

Dated: Nov. 09, 1993

/s/ [Illegible]
Judge of the Superior Court
County of San Mateo

DISTRICT COURT
SIXTH JUDICIAL DISTRICT
STATE OF MINNESOTA
COUNTY OF ST. LOUIS

WOMEN'S HEALTH CENTER OF DULUTH (PA),
Plaintiff,

vs.

OPERATION RESCUE, MISSIONARIES TO THE PREBORN, LAMBS OF CHRIST, RALPH OVADAL, BRIAN JOHNSON, LESLIE "LYDIA" LIEBLIN, GREG SCHWEIGGER, JOE FOREMAN, KEITH TUCCI, RANDALL TERRY, MARGARET WULF, CHARLES WULF, ORVILLE STONE, JR., ROSCOE BUTTERFIELD, MIKE HANSEN, LEANN HANSEN, LINDA O'CONNOR, JOHN AND JANE DOE, AND ALL PERSONS ACTING IN CONCERT WITH THEM,
Defendants.

TEMPORARY RESTRAINING ORDER

The above entitled matter came before the undersigned Judge at the above-named Court on the 16 day of June, 1993. Plaintiff appeared by counsel. Susan Ginsburg and Jeffrey T. Wallace. The Court having heard counsel and having reviewed and considered the Motion, Affidavits, Memorandum and records and files herein makes the following:

TEMPORARY ORDER

1. That the Defendants, their agents, and all organizations and persons acting in concert or participation with Defendants who receive notice of this Injunction by personal service, by having it read to them, or otherwise, be enjoined and restrained in any manner, or by any means, from:

a. trespassing on, sitting in, blocking, impeding or obstructing ingress or egress from the Women's Health Center (hereinafter WHC) facilities and the homes and residences of staff, paid or volunteer, agents and patients of the WHC;

b. harassing, intimidating or physically abusing persons entering, leaving or working at WHC facilities;

c. obstructing the work of the persons located at WHC facilities by any means, including preventing use of the WHC telephone lines, singing, chanting, yelling, shouting, or screaming, that substantially interferes with the provision of medical services including counseling, with such facility;

d. going within 100 feet of the property line of the Arrowhead Place during such times as WHC is open for business;

e. going within 2 city blocks of the homes or residences of staff, paid or volunteer, agents and patients of WHC;

f. following, harassing, religious blessing or praying, photographing, videotaping and intimidating, or speaking with the staff, paid or volunteer, agents and patients of WHC, and their families, who indicate that they do not wish to be spoken to;

g. distributing leaflets or brochures to any person who has indicated orally or by gesture that such person does not wish to receive such literature; and

h. inducing, encouraging, or directing others to take any of the actions described above.

2. That Defendants be directed to inform all persons who assemble to participate in any demonstration or "rescue" at WHC or similar action in concert or participation with Defendants of the existence and contents of the TRO, Preliminary and/or Permanent Injunction governing the behavior specified above;

3. That nothing in the Injunction shall be construed to limit Defendant's lawful exercise of their legitimate First Amendment rights, except that reasonable restrictions on the time and manner of Defendant's expression of their right to picket and demonstrate are included herein;

4. That a contempt penalty of $5,000.00 per day for the first violation of the Order be imposed on each Defendant, and each agent of Defendants, and each person acting in concert or participation with Defendants with notice of this Preliminary and/or Permanent Injunction, who violate the terms of this Preliminary and/or Permanent Injunction and whose contempt is proven;

5. That each successive violation of this Order subject the contemnor to a civil contempt fine double of the previous fine;

6. That any amount collected under a judgment of contempt be paid into the Registry of the Court to be disbursed by further Order of the Court; and

7. That each contemnor be jointly and severally liable for all attorney's fees and related costs incurred by the Plaintiff in relation to enforcement of the Injunction.

8. That the Court grant such other and further relief as to this Court may seem just, appropriate and proper.

The Defendants shall be restrained until the 19th day of July, 1993 at 9:45 o'clock fore after noon or as soon thereafter as the matter shall be heard by the Court whether or not to grant a preliminary injunction.

Dated this 16th day of June, 1993.

BY THE COURT:

/s/ [Illegible]
Judge of District Court

STATE OF NORTH DAKOTA
COUNTY OF CASS
IN DISTRICT COURT

Civil No. 91-1953

FARGO WOMEN'S HEALTH ORGANIZATION, INC., GEORGE MIKS, M.D., SUSAN WICKLUND, M.D., JANE BOVARD, Administrator, and on behalf of the staff of Fargo Women's Health Organization, Inc., and JANE DOE(S), being fictitious names intended to designate present and prospective patients of the Fargo Women's Health Organization,

Plaintiffs,

vs.

LAMBS OF CHRIST; FOCUS ON FARGO; HELP AND CARING MINISTRIES; COMMUNITY PRAISE CENTER; DAROLD LARSON; JODY CLEMENS; TIM LINDGREN; KATHY BENEDA LINDGREN; CHET GALLAGHER; CHRIS VENKELESE; RON MAXON; OPERATION RESCUE; and all other individuals, associations, and organizations who's names or legal identities are otherwise unknown to Plaintiff's at this time, with whom they have conspired and acted in concert with to deprive Plaintiff's of their rights,

Defendants.

AMENDED TEMPORARY INJUNCTION

Whereas, the Plaintiffs, Fargo Women's Health Organization, Inc., George Miks, M.D., Susan Wicklund M.D., Jane Bovard, Administrator, and on behalf of the staff of Fargo Women's Health Organization, Inc., and JANE DOE(S), being fictitious names intended to designate present and prospective patients of the Fargo Women's Health Organization, through their attorneys, Alan Pol-

lack of New York, N.Y. and William Kirschner, of Fargo, N.D. brought on for hearing at the Cass County Courthouse at 1:30 p.m. on November 6, 1991, the Plaintiffs' Motion for a Preliminary Injunction; and

WHEREAS, the named defendants, Lambs of Christ; Focus on Fargo; Help and Caring Ministries, Inc.; Community Praise Center; Darold Larson; Jody Clemens; Tim Lindgren; Kathy Beneda Lindgren; Chris Vankelese; Ron Maxon; Operation Rescue; appeared personally or through their respective attorneys, Richard Varriano of Moorhead Minnesota, Peter Crary of Fargo, North Dakota, and Monty Mertz of Fargo, North Dakota. Defendant Chet Gallagher appeared pro se; and,

WHEREAS, the original Order herein having been appealed to the Supreme Court of North Dakota on the 2nd day of January, 1992 and the Supreme Court having issued its Order affirming the injunction in part, reversing in part, and remanding the provision of the 100 foot restriction to this Court for more specific findings, a hearing was held on this issue at the Cass County Courthouse on September 16, 1992 at 10:00 a.m. and,

WHEREAS, the named defendants, Lambs of Christ; Focus on Fargo; Help and Caring Ministries, Inc.; Community Praise Center; Tim Lindgren; Kathy Beneda Lindgren; Chris Venkelese; Ron Maxon; Operation Rescue; appeared personally or through their respective attorneys, Richard Varriano of Moorhead Minnesota, Peter Crary of Fargo, North Dakota, North Dakota, Defendant's Darold Larson and Jody Clemens appearing pro se, and the Defendant Chet Gallagher not appearing; and,

WHEREAS, the Court having reviewed the pleadings and affidavits previously submitted to it, and having heard the arguments of Counsel and the pro se Defendants, this Court, being fully apprised in the premises, and having made it's Findings of Facts, Conclusions of Law, and Order for Judgment does hereby issue Judgment as follows:

1. That this Court has jurisdiction of the subject matter and of the parties to this action.

2. That the Amended Temporary Injunction shall read as follows:

IT IS HEREBY ORDERED AND ADJUDGED THAT YOU, Lambs of Christ; Focus on Fargo; Darold Larson; Jody Clemens; Tim Lindgren; Kathy Beneda Lindgren; Chet Gallagher; Chris Venkelese; Ron Maxon; Operation Rescue; all persons in active concert or participation with them; and all other individuals who receive actual notice of this Amended Temporary Injunction by personal service of a copy of said Amended Temporary Injunction or by having it read to them, and each of them, ARE HEREBY ENJOINED AND ARE ORDERED TO RESTRAIN FROM:

(a). trespassing on, sitting in, blocking, impeding or obstructing ingress or egress from FWHO facilities and the home and residence of Plaintiff Bovard, as well as the homes and residences of any staff (paid or volunteer) or patients of FWHO.

(b). harassing, intimidating or physically abusing persons entering, leaving or working at FWHO facilities and the spouses and family members of those persons entering, leaving or working at FWHO;

(c). obstructing the work of the persons located at FWHO facilities by any means—including singing, chanting, yelling, shouting, or screaming—that substantially interferes with the provision of medical services including counseling, with such facility;

(d). going within 100 feet of the property line of FWHO during such times as they are open for business, Monday through Saturday, from 7:30 a.m. til 6:00 p.m., except that two people may quietly and peacefully picket such facility, so long as said people do not interfere with the operations of said

facility, or individuals seeking to enter or leave FWHO as provided herein.

(e). following, harassing, photographing, videotaping, and intimidating done without consent, and persistently and with the intent to harass and intimidate staff and patients.

(f). inducing, encouraging, or directing others to take any of the actions described in paragraphs (a).-(e). above.

(g). That nothing in this Amended Temporary Injunction shall be construed to limit defendant's lawful exercise of their legitimate First Amendment rights, except that reasonable restrictions on the time and manner of defendant's expression of their right to picket and demonstrate are included herein. Further, this order shall not enjoin activity outside the territorial jurisdiction of this Court.

(h). That a contempt penalty for the first violation of the Amended Temporary Injunction may be imposed on each defendant, and their agents, all other individuals acting in concert or participation with defendants; and all other individuals who receive actual notice of this Amended Temporary Injunction, who violate the terms of this Amended Temporary Injunction and whose contempt is proven;

(i.) That each successive violation of this Amended Temporary Injunction may subject the contemnor to such penalties as are provided by law.

(j). That each contemnor may be jointly and severally liable for all attorneys' fees and related costs incurred by plaintiffs in relation to enforcement of this Amended Temporary Injunction.

3. The Amended Temporary Injunction entered here shall apply to any and all individuals who receive notice of the Amended Temporary Injunction. Service of this

notice can be made by personally handing or reading a copy to a person who is in violation or who is intending to violate the terms of the Amended Temporary Injunction.

4. Upon Entry of this Amended Temporary Injunction, the previously issued Orders in this case shall cease to be effective.

Dated this 17 day of September, 1992.

BY THE COURT:

/s/ Lawrence A. Leclerc
HONORABLE LAWRENCE A. LECLERC
Judge of District Court

IN THE SUPERIOR COURT OF DEKALB COUNTY
STATE OF GEORGIA

Civil Action File No. 91-10869-9

JAMES GAY, M.D., *et. al.*,
Plaintiffs,

v.

NANCY KUEHL, *et. al.*,
Defendants.

ORDER AND PERMANENT INJUNCTION

The Court having reviewed the record and evidence presented at hearing before the Court on Plaintiffs' Petition for Preliminary Injunction on December 19, 1991, upon which the Court heard evidence and argument of Counsel, the Court now finds as follows:

The Northside Women's Center is located on a curve on Chamblee-Dunwoody Road, a well-travelled four-lane thoroughfare in DeKalb County, Georgia. Because of the curve of the roadway in front of the clinic, those leaving the clinic premises are disadvantaged by a limited sight distance. There is a 7'5" right-of-way running the entire 245' length of the clinic property along Chamblee-Dunwoody Road and separating the clinic property from the roadway.

Defendants have participated in demonstrations at the medical clinic for the past several years. Demonstrators have shouted at clinic staff members, "counselled" patients regarding alternatives to abortion, prayed aloud for an end to abortion, and disseminated anti-abortion literature. Most of the activities of the demonstrators have taken place in the 7'5" right-of-way bordering clinic property.

Demonstrators, some carrying large signs, have walked back and forth along the right-of-way and across driveways leading onto clinic property impeding the free ingress and egress of patients, staff and other vehicles to the clinic facility. Large signs held by demonstrators as well as the presence of large numbers of demonstrators in the right-of-way effectively block the vision of drivers coming into and out of clinic driveways and those travelling on Chamblee-Dunwoody Road. Vehicles entering the clinic premises have been stopped by demonstrators while the vehicle was partially blocking the roadway. The Court is extremely concerned about the safety of those entering and leaving the clinic property, motorists travelling on Chamblee-Dunwoody Road, and the demonstrators themselves.

This situation presents a classic case of the rights of the Plaintiffs to operate a lawful, licensed business and medical facility and the rights of clinic patients to obtain desired medical services colliding with the Defendants' Constitutional rights of freedom of speech and freedom of assembly. A balance is necessary to preserve the rights of all. In seeking an injunction, Plaintiffs have demonstrated that they have no adequate remedy at law.

PERMANENT INJUNCTION

IT IS THEREFORE ORDERED that any person operating on any Defendant's behalf or demonstrating in the vicinity of the Northside Women's Center is permanently restrained and enjoined from trespassing on, blockading, impeding or obstructing access to or egress from the Northside Women's Center. Further, demonstrators are restrained and enjoined from using any sign to block or impede ingress or egress to this facility's driveways.

IT IS FURTHER ORDERED that not more than 10 people shall congregate at any one time in the 7'5" right-of-way adjoining the clinic property in the area between the two driveways and not more than five people shall

congregate at any one time on the concrete sidewalk portion of the 7'5" right-of-way. Further, in the interest of safety, all demonstrators are enjoined from approaching within 10 feet on either side of any driveway extending from Chamblee-Dunwoody Road onto clinic property and no signs shall be placed or extended into this 10 foot area on either side of any driveway.

The Court further enjoins any demonstrators from physically or verbally abusing, assaulting, harassing or interfering with persons lawfully entering or leaving, working at or using any services at or upon Plaintiffs' business premises located at 3543 Chamblee-Dunwoody Road. Sidewalk counselling, consisting of quiet conversation of a non-threatening nature by not more than two people, is not enjoined by this Order.

Any person who receives a copy of this Order or who shall otherwise have knowledge of the terms of this Order shall be deemed to have notice of this Order and to be bound thereby for purposes of enforcement.

The Sheriff of DeKalb County or any police officer is ordered to immediately effect the arrest of any person having notice of this order who shall violate its terms and require that the person post a cash bond in the amount of $500.00 to secure the appearance of the person before the appropriate non-jury division of this Court to show cause why the person should not be found in contempt of this Order of the Court, except as otherwise set forth in the Orders of this Court as to the DEFENDANTS JANE SHEPHERD, NANCY KUEHL, DAPHNE MADOL, and WILLIAM HICKSON entered on July 24, 1992, and except as otherwise set forth specifically below as to DEFENDANT BOB JEWITT, the terms of which orders are incorporated by reference herein.

It is FURTHER ORDERED that DEFENDANT BOB JEWITT and any person operating in concert with or on

behalf of DEFENDANT BOB JEWITT be and is hereby permanently restrained and enjoined from this day forward and for his lifetime:

(1) From coming within 200 yards of the Northside Women's Clinic; provided, however, that, notwithstanding this distance limitation, Defendant Bob Jewitt is permitted to pass closer than 200 yards of the clinic both in the course of travelling Peachtree Industrial Boulevard and in the course of legitimate commercial enterprise with any business located along Peachtree Industrial Boulevard;

(2) From encouraging other persons to engage in abortion protest activities within the vicinity of the Northside Women's Clinic;

(3) From taking any part whatsoever in the planning, execution or funding of any abortion protest activities with or by others which protest activities would take place within the vicinity of the Northside Women's Clinic.

IT IS FURTHER ORDERED that should DEFENDANT BOB JEWITT appear within 200 yards of the Northside Women's Clinic, the Police Chief of the City of Chamblee, the Sheriff of the County of Dekalb, or any law enforcement officer within the state of Georgia is directed to immediately effect the arrest and detention of DEFENDANT BOB JEWITT to appear before this Court to show cause why BOB JEWITT should not be found in contempt of this Court's order;

FURTHER ORDERED that upon a determination by this Court that DEFENDANT BOB JEWITT has violated this injunction, DEFENDANT BOB JEWITT shall pay $5000.00 (five-thousand dollars) for each such violation, to the PLAINTIFFS as and for liquidated damages, and costs and attorneys fees of such action.

All other claims for relief against Defendant Bob Jewitt, prayed for in the Complaint, are hereby dismissed, costs paid.

This Order shall not impair nor bar the PLAINTIFFS' rights or causes of action against any other person, named or unnamed, in this cause.

All of which is SO ORDERED this 11th day of December, 1992.

/s/ [Illegible]
Judge
DeKalb County Superior Court
State of Georgia

Supreme Court, U.S.
FILED
APR - 1 1994

No. 93-880

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

JUDY MADSEN, *et al.*,
Petitioners,
v.
WOMEN'S HEALTH CENTER, INC., *et al.*,
Respondents.

On Writ of Certiorari to the Supreme Court of Florida

BRIEF OF PEOPLE FOR THE AMERICAN WAY, THE ANTI-DEFAMATION LEAGUE, THE AMERICAN JEWISH CONGRESS, AMERICANS FOR RELIGIOUS LIBERTY, THE RELIGIOUS COALITION FOR REPRODUCTIVE CHOICE, AND THE NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC. AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether, in the context of a pattern of illegal conduct and violations of previous injunctions, a court may constitutionally impose specific time, place and manner restrictions on individuals and organizations and those acting in concert with them to prohibit blocking access to a medical facility, harassing the facility's patients and staff, engaging in activities that threaten patients' health, and harassing and picketing staff members at their homes.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

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v.

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INTEREST OF *AMICI CURIAE*

The undersigned *amici* are civil rights, civil liberties, and religious organizations whose members are deeply concerned about both sets of rights and interests at stake in this case: the First Amendment right of free expression and the right to reproductive choice protected by the due process clauses of the Fifth and Fourteenth Amendments. *Amici* believe that, when properly interpreted, the trial court's amended injunction imposes reasonable and

content-neutral time, place and manner restrictions against specific parties who intentionally and repeatedly violated the court's previous, more narrow injunctions against illegal behavior. As *amici* explain below, as a result of these factors, as well as because the amended injunction applies only to specific parties and those acting in concert with them and not to all who oppose abortion, and because of its adaptability to particular circumstances, the injunction ensures access to reproductive medical care consistent with the protection of First Amendment freedoms, and should be upheld.

People For the American Way ("People For") is a nonpartisan, education-oriented citizens' organization established to promote and protect civil and constitutional rights, including First Amendment freedoms, the constitutional right to privacy, and women's rights to reproductive choice. Founded in 1980 by a group of religious, civic and educational leaders devoted to our nation's heritage of tolerance, pluralism and liberty, People For now has over 300,000 members nationwide. People For has frequently represented parties and filed *amicus curiae* briefs before this Court in litigation seeking to defend First Amendment rights. People For also has participated in litigation protecting women's rights to reproductive choice. People For is filing this *amicus* brief because this case implicates the organization's dual concerns of ensuring women safe access to reproductive medical care, including abortion, and fully protecting First Amendment freedoms. Based on the specific record in this case, the trial court's amended injunction accomplishes both of these purposes by narrowly enjoining conduct of parties who have repeatedly harassed and violated the rights of patients and health professionals, while leaving those parties ample avenues for free expression.

The Anti-Defamation League ("ADL") is a human relations organization established over 80 years ago "to secure justice and fair treatment to all citizens alike." ADL is committed to safeguarding principles of religious

and individual liberty, including freedom of speech and association, the right to privacy, and reproductive freedom. The right to abortion, and the right to oppose abortion, raise sharp conflicting and competing interests, which must be accommodated. ADL believes the injunction at issue, which establishes content-neutral parameters for abortion protests, accomplishes that accommodation. The injunction respects the rights of individuals to voice their opinions, and, at the same time, protects the ability of other individuals to exercise their constitutional rights. In support of these principles, ADL has filed briefs in this Court in such cases as *Wisconsin v. Mitchell*, 113 S. Ct. 2194 (1993); *Bray v. Alexandria Women's Health Clinic*, 113 S. Ct. 753 (1993); *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 112 S. Ct. 2791 (1992); *Hodgson v. State of Minnesota*, 497 U.S. 417 (1990); and *Frazee v. Illinois Dep't of Employment Sec.*, 489 U.S. 829 (1989).

The American Jewish Congress ("AJC") is a national organization of American Jews founded in 1918 and committed to the preservation of the civil liberties and civil rights of Jews and of all Americans. AJC has filed many briefs in this Court supporting First Amendment rights and free expression. In addition, AJC believes that a woman's freedom to choose whether, when, or if to bear children, and to obtain medical and counselling services in connection with that freedom, must and should be protected as an essential constitutional liberty.

Americans for Religious Liberty ("ARL") is a nationwide nonprofit educational organization dedicated to defending religious freedom and freedom of conscience. ARL has appeared before the Supreme Court in a number of *amicus curiae* briefs in defense of the right of all women to freedom of choice in dealing with problem pregnancies.

The Religious Coalition for Reproductive Choice is comprised of 36 national religious organizations that have

official pro-choice policies. The Coalition's purpose is to ensure that every woman is free to make decisions about when to have children according to her own conscience, without government interference. The Coalition's primary role is educating the public to make clear that abortion can be a moral, ethical, and religiously responsible decision.

The NAACP Legal Defense & Educational Fund, Inc. ("LDF") is a non-profit corporation formed to assist African Americans in securing their constitutional and civil rights and liberties. For many years LDF has pursued litigation to secure the basic civil and economic rights of low-income African American families and individuals. Litigation to ensure the non-discriminatory delivery as well as the adequacy of health care and hospital services available to African American communities has also been a long-standing LDF concern. *See, e.g., Bryan v. Koch*, 627 F.2d 612 (2d Cir. 1980) (challenging the closing of Sydenham public hospital in Harlem under Title VI of the Civil Rights Act of 1964). LDF has also worked on behalf of African Americans struggling with the burden of poor health and discriminatory and inadequate health care services.

LDF is particularly concerned with the growing rates of poverty among African Americans and with the number of single female-headed African American families that are living in poverty. Health care for low-income uninsured women and their families is a matter of great concern to LDF. Through its Poverty & Justice Program, LDF is challenging the barriers to economic advancement to help to improve the economic status and living conditions of the many in poverty.[1]

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[1] The parties' letter of consent to the filing of this brief has been filed with the Court pursuant to Rule 37.3.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case arises in the context of a sustained campaign to interfere with the operation of a family planning clinic where abortions are performed and to intimidate and harass the clinic's staff and patients. The initial judicial response was a brief order that simply prohibited certain organizations and individuals from blocking access to the clinic and physically abusing persons who worked at or used the clinic. J.A. 9. When this order failed to provide adequate protection to the clinic, its staff and its patients, and when the evidence established a concerted pattern of violation of the court's orders and continued harassment and disruption, the court entered a more detailed injunction that imposed specific time, place and manner restrictions on the defendants and those acting in concert with them. The Supreme Court of Florida, finding that the "demonstrators' tactics have impaired the functioning . . . of . . . a licensed medical facility and have placed in jeopardy the health, safety and rights of Florida women," upheld the amended injunction. *Operation Rescue v. Women's Health Ctr.*, 626 So. 2d 664, 675 (Fla. 1993).

Petitioners, who are anti-abortion activists, challenged the amended injunction on First Amendment grounds. They invoke concerns—prior restraint, content-based restrictions, overbreadth—that are central to First Amendment jurisprudence. But these concerns are not controlling on the facts of this case.

In this case, the court entered its injunction only after holding a full evidentiary hearing that revealed a history and pattern of illegal conduct and violations of previous injunctions. In this case, the court imposed time, place and manner restrictions that are content neutral and are narrowly tailored to protect significant governmental interests without materially affecting petitioners' ability to express and promote their views. And in this case, the court's doors remain open to clarify any provisions in the

injunction that may unintentionally impinge on First Amendment rights.

ARGUMENT

I. THE INJUNCTION IS CONTENT NEUTRAL.

Petitioners contend that the injunction issued by the Florida court is content based, that it imposes restrictions on demonstrators because of their anti-abortion beliefs and seeks to stifle the expression of anti-abortion views. In light of the facts of this case, however, this contention is without merit.

A. The Injunction Is Not Content Based Simply Because It Is Directed At Speakers Whose Views Are Known.

An injunction, unlike an ordinance, must be directed at specific persons.[2] Thus, an injunction enforcing even the most traditional and non-controversial time, place and manner restrictions will usually be directed against someone whose political or social views are well known. This does not mean, however, that the injunction is content based.

Take the example of a protest group that believes the United States is reducing military expenditures too quickly and therefore launches a campaign to "wake up America" by broadcasting its message by sound truck in residential neighborhoods at 1:00 in the morning. A court that was requested to enjoin the 1:00 a.m. sound truck campaign would certainly know the views of the speaker and the content of the challenged speech. But this does not mean that an injunction against the protest

[2] "'[A] court of equity is as much so limited as a court of law; it cannot lawfully enjoin the world at large, no matter how broadly it words its decree.'" *Alger v. Peters*, 88 So. 2d 903, 907 (Fla. 1956) (quoting *Alemite Mfg. Corp. v. Staff*, 42 F.2d 832 (2d Cir. 1930) (Hand, J.)).

group barring any sound trucks between 10:00 p.m. and 8:00 a.m. is content based. As long as there is no reason to believe that an injunction would not be issued against other speakers in similar circumstances, the injunction should be regarded as content neutral. "Government regulation of expressive activity is content neutral so long as it is '*justified* without reference to the content of the regulated speech.'" *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

This same reasoning must be applied to the Florida courts and the numerous other courts throughout the nation now struggling with the issues raised by demonstrations at abortion clinics. Obviously, these courts know the views of the demonstrators, just as in years past they would have known the views of the demonstrators at draft boards, university admissions buildings or segregated lunch counters. The fact that the courts know the views of each of these speakers is immaterial, so long as that knowledge does not form the basis for the injunction and the injunction is otherwise consistent with the First Amendment. The content neutrality of an injunction depends on the nature of the restrictions it imposes, not on the views of the persons being enjoined.[3]

B. The Restrictions Imposed By The Injunction Are Content Neutral.

The injunction in this case is clearly content neutral on its face; its time, place and manner restrictions do not refer to any particular content or message. It is also

[3] The majority in *Cheffer v. McGregor*, 6 F.3d 705 (11th Cir. 1993) argued that a restriction on the speech of "the Republican Party, the state Republican Party, George Bush, Bob Dole, Jack Kemp and all persons acting in concert or participation with them. . . ." could not be content neutral. That argument is clearly incorrect. If those organizations and individuals engaged in the use of sound trucks at 1:00 a.m., a decision to restrict such conduct would certainly appear to be content neutral, absent evidence of discriminatory enforcement.

content neutral in objective. As the Court stated in *Ward*, 491 U.S. at 791, "[t]he government's purpose is the controlling consideration. A regulation that serves purposes unrelated to the content of expression is deemed neutral . . . ." The purposes served by the injunction here are obvious. First, the injunction seeks to assure access to the clinic to employees, patients and other invitees. Second, it seeks to protect patients and staff from being physically abused, harassed and intimidated as they enter the clinic. Third, the injunction seeks to protect the health of clinic patients by reducing noise during periods of medical treatment. Fourth, the injunction seeks to prohibit defendants from extending their harassment of clinic employees by invading the privacy of employees' homes. None of these objectives is related to the content of the regulated expression.[4]

C. The Injunction's Application To Persons Acting In Concert With Named Defendants Does Not Render It Content Based.

Petitioners argue that the injunction in this case was applied to persons accused of "acting in concert" with the named defendants in a manner that makes the injunction

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[4] Only one restriction in the injunction can arguably be considered content based: the bar against "images observable" to patients during surgery and recovery hours. In the context of paragraph 4 of the injunction, the restriction appears aimed at protecting patients from visual "noise" or clutter, irrespective of the content of the images. But even if this restriction is deemed content based, the state has the requisite compelling interest in imposing it. Patients undergoing surgery or in recovery are certainly at least as in need of protection from disturbing speech or proselytizing as voters on the way to the polls. *See Burson v. Freeman*, 112 S. Ct. 1846, 1851 (1992). *See also Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 509 (1978) (Blackmun, J., concurring); *NLRB v. Baptist Hosp.*, 442 U.S. 773, 783-84 n.12 (1979) (hospitals may shield patients from upsetting speech). In another era, a court would not have been barred from shielding servicemen undergoing surgery from the chants and placards of anti-war protesters.

content based. This argument is unsupported by the record.

It is correct that the injunction applies not only to specific organizations and individuals but also to "all persons acting in concert or participation with them." The "in concert" language is taken directly from the Florida Rule of Civil Procedure 1.610(c), which provides that "every injunction shall be binding on the parties and on those parties in active concert or participation with them." The language of the Florida rule is essentially identical to that which appears in Federal Rule of Civil Procedure 65(d).

The "in concert" language appears in both the Florida and federal rules of procedure because without it any injunction would be meaningless. Named defendants could circumvent the injunction by arranging for some other person to carry out the prohibited acts. The courts of Florida have routinely employed the "in concert" language without controversy. *See, e.g., Florida Jai Alai, Inc. v. Southern Catering Servs.*, 388 So. 2d 1076 (Fla. Dist. Ct. App. 1980); *Miami v. Miami Dolphins, Ltd.*, 374 So. 2d 1156 (Fla. Dist. Ct. App. 1979); *U Shop Rite, Inc. v. Richard's Paint Mfg. Co.*, 369 So. 2d 1033 (Fla. Dist. Ct. App. 1979).

Petitioners argue that the judge who entered the injunction ruled that persons are "acting in concert" simply because they advocate anti-abortion positions while present in the proscribed buffer zones, and that this ruling renders the injunction content based. Petitioners are unfairly characterizing the judge's comments at the hearing. The judge repeatedly stated that persons who advocated anti-abortion positions could demonstrate to the prosecutor or the trial court that they were not "acting in concert." *See* J.A. 66, 68, 70, 74, 77. In essence, the judge simply made the obvious point that the police were unlikely to

consider someone advocating a pro-choice position as "in concert." [5]

Petitioners also argue that the local police applied the "in concert" language in a content-based manner by indiscriminately arresting persons who indicated through speech or images that they held anti-abortion views. *Amici* note that any failure of the police to enforce the injunction in a proper manner does not render the terms of the injunction content based. Moreover, the Supreme Court of Florida only had before it review of "a trial court order imposing an amended permanent injunction." *Operation Rescue v. Women's Health Ctr.*, 626 So. 2d at 666. It did not have before it, and did not rule upon, the activities of the police in applying the injunction. Thus, those activities are not before this Court.

To the extent any confusion remains, this Court should make clear that this injunction can not be constitutionally applied to every person with an anti-abortion viewpoint solely on the basis of that viewpoint. *Amici* note that Florida and federal courts use the same standard to determine whether non-parties are subject to the terms of an injunction. " '[T]he only occasion when a person not a party may be punished, is when he has helped to bring about, not merely what the decree has forbidden, because it may have gone too far, but what it has power to forbid, an act of a party. This means that the respondent must either abet the defendant, or must be legally identified with him.' " *Alger v. Peters*, 88 So. 2d

[5] The majority in *Cheffer v. McGregor*, 6 F.3d 705 (11th Cir. 1993), were thus clearly incorrect in concluding that the amended injunction applies to Ms. Cheffer or any other anti-abortion person not acting in concert with named defendants. As Judge Paine explained in his dissenting opinion: "When the Amended Permanent Injunction is properly viewed as an injunction, it becomes clear that the state court lacks the power to reach Cheffer." *Id.* at 715. The only relief even arguably justified in *Cheffer*, assuming that standing existed, would have been a simple declaration that the amended injunction did not apply to Ms. Cheffer.

903, 907 (Fla. 1956) (quoting *Alemite Mfg. Corp. v. Staff*, 42 F.2d 832 (2d Cir. 1930) (Hand, J.)). *Cf. Chase Nat'l Bank v. Norwalk*, 291 U.S. 431, 437 (1934) (quoting *Alemite*). Interpreted in this manner, the "in concert" provisions of the injunction are clearly proper. There have been no contempt convictions in this case of persons claiming that they were not "acting in concert" with the named defendants. There is thus no basis for contending that the Florida courts will apply the injunction to all anti-abortion demonstrators or be unable properly to determine whether particular individuals were actually "acting in concert" with defendants for purposes of enforcing the injunction.

To the extent necessary to protect the rights of individuals not subject to the injunction, *amici* submit this Court may properly emphasize that two independent determinations must be made before the injunction can be enforced against any individual: whether that person is violating the substantive time, place and manner provisions of the injunction, and whether that person is acting in concert with named defendants.[6] *Amici* are confident that the Florida courts will properly enforce the injunction and instruct the police on the meaning of "acting in concert," consistent with any guidance the Court may provide in this case. On the record in this case there is no justification for invalidating the injunction itself.

[6] In practice, there will be many instances in which concerted activity is clear. According to testimony in the trial court, defendant Bruce Cadle acknowledged that he was a leader of a group of anti-abortion demonstrators and could often be seen directing the activities of other demonstrators. *See* J.A. 265-66, 291, 309-10.

II. THE INJUNCTION IS NARROWLY TAILORED TO SERVE A SIGNIFICANT GOVERNMENTAL INTEREST AND LEAVES SUFFICIENT ALTERNATIVE AVENUES OF COMMUNICATION ACCESSIBLE TO THE SPEAKER.

A content-neutral restriction on the time, place or manner of expression is permissible if the restriction is narrowly tailored to serve a significant governmental interest and leaves sufficient alternative avenues of communication accessible to the speaker. *See, e.g., Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983). In this case there can be no question that the restrictions imposed by the injunction serve significant governmental interests. First, the injunction protects the health of women undergoing abortions by reducing noise levels during the period of surgery and recovery and by ensuring that women who want abortions can obtain them in a timely manner. J.A. 55. *See NLRB v. Baptist Hosp.*, 442 U.S. 773, 781-84 (1979) (upholding regulations restricting speech based on need to avoid disruption of patient care and disturbance of patients); *see also Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 509 (Blackmun, J., concurring). Second, it protects the ongoing operations of the clinic and the interests of its clients and employees by assuring access to and from the clinic without harassment and intimidation. J.A. 55.[7] Third, it protects against defendants' efforts to extend their campaign of harassment of clinic employees by invading the privacy of employees' homes. J.A. 56; *see Frisby v. Schultz*, 487 U.S. 474 (1988).

It remains necessary to determine whether the injunction is narrowly tailored to serve these significant governmental interests. In making that determination, it is appropriate to review the history of this injunction. The record demonstrates that the trial court moved carefully in its efforts to craft an injunction that restricts expressive activity as little as possible. The court first tried to address respondents' concerns through an injunction that simply enjoined petitioners from harassing clients, blocking access to the clinic and physically abusing persons entering or leaving the clinic. J.A. 5-10. This injunction remained in place for six months, during which time, as the record shows, the petitioners and other demonstrators engaged in conduct that interfered with the operations of the clinic through threats, harassment, intimidation, disruption and physical obstruction. *See generally*, J.A. 50-56. Accordingly, after a full evidentiary hearing, the court concluded that its initial injunction was insufficient and entered a more specific injunction.

[7] In *Baptist Hosp.*, this Court noted that certain expression "may disrupt patient care if it interferes with the health-care activities of doctors, nurses and staff, even though not conducted in the presence of patients." 442 U.S. at 782 n.11.

During three days of testimony, the court heard evidence that, despite its previous injunction, there had been serious interference with ingress to the clinic. Judge McGregor found that the activities of petitioners and others demonstrating with them had hindered access to the clinic's parking lots (J.A. 51, 55) and blocked traffic on the public street in front of the clinic (J.A. 52, 55). The amended injunction therefore permits anti-abortion demonstrators to gather on the south side of Dixie Way, rather than the north side, to prevent the crowd from blocking access to the clinic. J.A. 57-58.

The amended injunction was also directed at conduct shown to have posed medical risks to the clinic's patients. Judge McGregor noted testimony that

> the demonstrators [ran] along side of and in front of patients' vehicles, pushing pamphlets in car windows to persons who had not indicated any interest in such literature. As a result of patients having to run such a gauntlet, the patients manifested a higher level of anxiety and hypertension causing those patients to need a higher level of sedation to undergo the surgical procedures, thereby increasing the risk associ-

> ated with such procedures.[8] . . . The doctor also testified that he observed some patients turn away from the crowd in the driveway to return at a later date. He testified that such delay in undergoing the procedures also increased the risk associated therewith.

J.A. 54.

The court concluded that the actions of the petitioners continued to impede and obstruct both staff and patients from entering the clinic and that "the noise associated with the demonstrations impermissibly interferes with the operation of the clinic and the well-being of its patients." J.A. 55. It was on the basis of these concerns for the well-being of the clinic's patients that Judge McGregor enjoined loud noises "during surgical procedures and recovery periods . . . ." J.A. 59. Finally, the court heard testimony that clinic employees and sometimes the minor children of clinic employees were accosted in their homes by petitioners. Judge McGregor found these actions at the homes of clinic staff to be impermissible conduct. J.A. 56.

The injunction must be judged in this context and in light of the failure of the previous injunction to prevent illegal conduct. Given this history, the court was entitled to impose an injunction which might be somewhat broader in scope than that which would have been appropriate *ab initio*. The initial injunction in this case only prohibited patently illegal conduct—trespassing on clinic property, blocking access to the clinic and physically abusing persons using and working at the clinic. J.A. 9. But after hearing the evidence, the court appropriately

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[8] *Amici* note that it was this testimony that resulted in paragraph 5 of the injunction prohibiting demonstrators from approaching patients within 300 feet of the clinic. *Amici* believe that this restriction, aimed at protecting patients from unwelcome intrusion, intimidation and harassment, is content neutral. But even if it is not content neutral, the testimony as to the potential harm to patients establishes a compelling interest for the restriction. *See* note 4, *supra*.

determined that the only way to protect the clinic, its staff and its patients was to prohibit conduct that might be legal under other circumstances. Thus, to prevent demonstrators from blocking access to the clinic, the court established a 36-foot buffer zone around the clinic. Similarly, it established buffer zones to protect patients seeking to enter the clinic from unwelcome intrusion and physical intimidation and to protect clinic employees from extension of the pattern of harassment into their homes.

Petitioners contend that the fact that the injunction enjoins some possibly lawful conduct renders it overbroad and not narrowly tailored. They cite a footnote in *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), stating that the injunction issued by the Mississippi courts in that case "must be modified to restrain only unlawful conduct and the persons responsible for conduct of that character." *Id.* at 924 n.67. *Claiborne* is clearly distinguishable. In *Claiborne*, the NAACP and its leaders had organized a *lawful* economic boycott of certain white-owned businesses, and no evidence connected them to the "isolated acts of violence" which occurred during the boycott and caused the damages to plaintiffs. *Id.* at 923. Furthermore, there was no evidence that the NAACP and its leaders had committed or ratified any illegal acts, or that they had violated a prior injunction preventing only unlawful conduct. *Id.* at 930-31. Despite this evidentiary record, the Mississippi court entered a large damages award and an injunction which essentially sought to stifle completely the NAACP's lawful efforts to promote economic, political, and social change in the local area. Under these facts, this Court reversed the damages award and the injunction against the NAACP and its leaders.

In sharp contrast, the court's amended injunction here addresses an admittedly illegal blockade of a medical clinic by organizations and their leaders who, according to detailed evidence, committed numerous illegal and

threatening acts. In this case, which does not involve a crippling damages award, the court's original temporary and permanent injunctions did not enjoin any constitutionally protected activity. Only after receiving extensive evidence that its two prior injunctions had been violated did the court carefully tailor specific restrictions that prohibit some possibly lawful activity.

This Court has held that where illegal conduct has been demonstrated, a trial court is "empowered to fashion appropriate restraints on the [defendants'] future activities both to avoid a recurrence of the violation and to eliminate its consequences." *National Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679, 697 (1978). This is true even though the court may enjoin some otherwise lawful activity. As the Court has stated:

> While the resulting order may curtail the exercise of liberties that the [enjoined party] might otherwise enjoy, that is a necessary and, in cases such as this, unavoidable consequence of the violation. . . . In fashioning a remedy, the District Court may, of course, consider the fact that its injunction may inpinge upon rights that would otherwise be constitutionally protected, but those protections do not prevent it from remedying the . . . violation.

Id. at 697-98; *see also Milk Wagon Drivers Union, Local 753 v. Meadowmoor Dairies*, 312 U.S. 287 (1941).

The injunction also meets the "narrowly tailored" requirement because it clearly leaves sufficient alternative avenues of communication accessible to petitioners. Petitioners are free to demonstrate anywhere except within 36 feet of the clinic and 300 feet of a clinic staffer's home. Petitioners may be as noisy as they wish except during the hours of surgery and recovery. They may present their views to all persons seeking to enter the clinic except that they may not physically approach such persons within 300 feet of the clinic unless invited to do so. In short, petitioners have ample means to communicate their views concerning abortion to patients and potential

patients of the clinic, to employees of the clinic and to the public at large.[9] In essence, petitioners are restricted only in the manner in which they can present their views to people who are "captive" in their homes or "captive" by virtue of their need for medical treatment. *See Frisby v. Schultz*, 487 U.S. at 484-85 ("[A] special benefit of the privacy all citizens enjoy within their walls, which the state may legislate to protect, is an ability to avoid intrusions.").[10]

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[9] It could be argued, of course, that the 300-foot boundary line should be 250 feet or 200 feet. This Court responded to such a contention in *Burson v. Freeman*, 112 S. Ct. 1846, 1857 (1992), by stating that "[w]e do not think that the minor geographical limitations prescribed by [a statute forbidding campaign solicitations near polling places] constitute such a significant infringement. Thus, we simply do not view the question of whether the 100-foot boundary line could be somewhat tighter as a question of 'constitutional dimension.'" As explained in Section III, *infra*, moreover, any problems with a specific boundary line can be remedied while preserving the overall injunction.

[10] Petitioners also invoke the prior restraint doctrine. This Court, however, has not applied the prior restraint doctrine to cases such as this, where a remedial injunction is entered only after a full evidentiary hearing. *See National Soc'y of Professional Eng'rs*, 435 U.S. at 696-99; *Milk Wagon Drivers Union*, 312 U.S. at 293-98. *See also* discussion in *Carroll v. Presidents and Comm'rs of Princess Anne*, 393 U.S. 175, 179-84 (1968). Nor has this Court applied the prior restraint doctrine in cases involving content-neutral restrictions except in very limited circumstances. *See Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 586-87 n.9 (1983). To do so broadly would, *inter alia*, cast doubt on the constitutionality of the venerable injunction provisions of the copyright laws. *See* 17 U.S.C. § 502; *see also* Melville B. Nimmer, *Nimmer on Freedom of Speech* § 2.05[C], at 2-57 (1984). *See also Hirsh v. Atlanta*, 495 U.S. 927, 927 (1990) (Stevens, J., concurring in denial of stay) (explaining that it is "entirely proper" to distinguish between "injunctive relief imposing time, place and manner restrictions upon a class of persons who have persistently and repeatedly engaged in unlawful conduct" and an "injunction that constitutes a naked prior restraint against a proposed march by a group that did not have a similar history of illegal conduct in the jurisdiction where the march was scheduled").

III. THE INJUNCTION MAY BE EASILY AMENDED TO AVOID ANY UNANTICIPATED CONSEQUENCES RESTRICTING FIRST AMENDMENT AND OTHER RIGHTS.

Because this case involves an injunction rather than an ordinance or statute, petitioners have an easy remedy if certain applications of the injunction might violate the First Amendment in ways not anticipated by the court. Petitioners can apply to the court to amend or clarify the injunction. As in *National Soc'y of Professional Eng'rs*, petitioners "apparently fear[] that the [trial court's] injunction, if broadly read, will block legitimate paths of expression . . . . But the answer to these fears is . . . that the burden is upon the proven transgressor 'to bring any proper claims for relief to the court's attention.'" 435 U.S. at 698. *See also Milk Wagon Drivers Union*, 312 U.S. at 298 ("If an appropriate injunction were put to abnormal uses in its enforcement . . . . the doors of this Court are always open.")[11]

Petitioners contend, for example, that paragraph 6 of the injunction, which forbids them from "approaching" within 300 feet of the residence of clinic personnel, would bar a petitioner from simply living in the same apartment complex with a clinic employee or walking down such an employee's street. But there is no reason to believe that the Florida court intended to have paragraph 6 read or enforced in such a manner. *Amici* assume that the Florida court would, if requested by petitioners, amend the injunction to permit general "approaches" that

[11] Issues of vagueness, like overbreadth, take on a very different meaning in the context of an injunction. An injunction, "arising out of a particular controversy and adjusted to it, raises totally different constitutional problems from those that would be presented by an abstract statute with an overhanging and undefined threat to free utterance." *Milk Wagon Drivers Union*, 312 U.S. at 292. Thus, the standard by which an injunction is measured is whether it is specific in its terms and describes in reasonable detail the act or acts sought to be restrained. Fla. R. Civ. P. 1.610(c); Fed. R. Civ. P. 65(d).

are not specifically directed and targeted at clinic personnel for the purposes of harassing them. *See, e.g., Hill, Darlington & Grimm v. Duggar*, 177 So. 2d 734 (Fla. Dist. Ct. App. 1965) (clarifying injunction at request of defendant).

Indeed, to the extent that potential applications of the injunction appear to create specific problems, this Court may wish to make clear its understanding of the reach of the injunction and the constitutional problems that would arise if the Florida courts were to interpret the injunction too broadly or refuse to make appropriate clarifications. Of course, the Court can strike down particular provisions of the injunction if it believes they are unconstitutionally broad and not susceptible to adequate clarification. However, *amici* do not believe this action will be necessary because the record in this case establishes that the amended injunction appropriately protects against harassment and illegal behavior in a manner consistent with First Amendment freedoms.

CONCLUSION

For the foregoing reasons, *amici* respectfully urge that the decision of the Supreme Court of Florida be affirmed.

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